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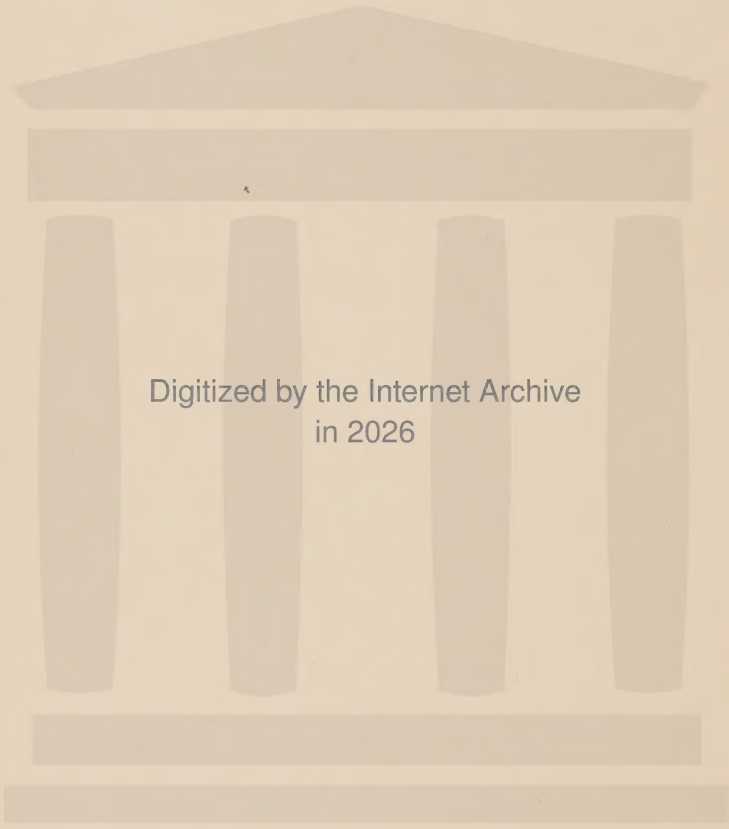
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Page	*Lines*	*For*	*Read*
153	1	45	35
168	13 from bottom	"action"	"motion"
174	12 from top	"accused"	"accuser"

And at p. 76 delete note (1).

MEMORANDA.

In the Long Vacation of 1881 Sir George Wilshere Bramwell resigned the office of one of the Lords Justices of the Court of Appeal, and was afterwards, on the 6th of February, 1882, created a Baron of the United Kingdom, by the title of Baron Bramwell, of Hever, Kent. He was succeeded on the 1st of November, 1881, by

Sir Nathaniel Lindley, Knight, one of the Justices of the High Court of Justice, and Ford North, Esq., Q.C., was appointed a Justice of the High Court in place of Lindley, J.

On the 27th of December, 1881, the Right Honourable Sir Robert Lush, one of the Lords Justices of the Court of Appeal, died, and on the 14th of January, 1882, Sir John Holker, Knight, Q.C., was appointed his successor.

On the 24th of May, 1882, Sir John Holker died, having filled the office of Lord Justice little more than four months. He was succeeded by

Sir Charles Synge Christopher Bowen, Knight, one of the Justices of the High Court of Justice, and John Charles Day, Esq., Q.C., was appointed a Justice of the High Court in place of Bowen, J.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January, 1882, will be as follows:—

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLIV VICTORIA.

ROYCE, APPELLANT; CHARLTON, RESPONDENT. 1881

Apprenticeship, Contract of—Place of Performance. *Nov. 7.*

A deed of apprenticeship contained the usual provision that the master should teach the apprentice, but no express provision as to the place where the contract was to be performed by the master:—

Held, that no stipulation could be implied that it was to be performed at the place where at the time of its execution the master carried on business and the parties to the deed resided.

Overruled by Eaton v Watkins 9 QBD 639

CASE stated by justices under 20 & 21 Vict. c. 43, of which the following is the substance:—

A claim had been made by the respondent against the appellant, under the Employers and Workmen Act, 1875, for damages for breach of the terms of a deed of apprenticeship made between the respondent, his mother, and the appellant, and for an order directing the appellant to perform so much of his contract under the said deed of apprenticeship as remained unperformed.

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ROYCE v. CHARLTON.

The case was heard at a petty sessions held at Mansfield, in the county of Nottingham.

The witnessing part of the apprenticeship deed was as follows: "This indenture witnesseth that Robert Charlton" (the respondent), "son of Ann Charlton, of No. 3, Newgate Lane, Mansfield, in the county of Nottingham, as well of his own free will as by and with the consent and advice of his said mother, doth put himself apprentice to George Appelbee Royce" (the appellant) "of Mansfield, in the said county of Nottingham, shoe manufacturer, to learn his art and with him after the manner of an apprentice to serve from the day of the date of this indenture unto the full end and term of four years from thence next following to be fully complete and ended, during which term the said apprentice shall serve his master in a faithful and obedient manner, and the said George Appelbee Royce for and in consideration of the faithful services of the said Robert Charlton, his said apprentice in the art of riveting boots and shoes which he now useth shall teach and instruct, or cause to be taught and instructed, paying unto the said apprentice the following weekly wages, viz., from the date of this indenture to the end of the first year five shillings per week, for the second year at the rate of seven shillings per week, for the third year at the rate of eight shillings per week, and for the fourth and last year at the rate of nine shillings per week, except for such time as the said apprentice shall lose through illness or otherwise. The said mother agrees to provide sufficient and proper food, clothing, lodging, and all other necessaries for the said apprentice during the said term."

It appeared that the appellant had ceased to carry on business at Mansfield, and declined to employ the respondent as apprentice in that place, but that the appellant was managing director of Royce, Gascoine, & Co., Limited, shoe manufacturers, carrying on business at Leicester, and was willing to take the respondent to work at Leicester under the said deed of apprenticeship.

It was urged before the magistrates on behalf of the appellant that, while under the said deed of apprenticeship he was bound to employ the respondent as such apprentice for the term and according to the conditions of the said deed, he was not bound to so employ him at Mansfield, but wherever Royce, Gascoine, &

Co., Limited, of which company he was the managing director, might find it necessary to carry on business, that the respondent was apprenticed to the appellant in his capacity of managing director as aforesaid, that Royce, Gascoine, & Co. had found it impossible to carry on business at Mansfield at a profit, and had been compelled to give it up, that they were carrying on business at Leicester, forty miles from Mansfield, the principal centre of the boot and shoe trade, where they could carry on business with greater success, and where they were willing to find the respondent work and to fulfil the terms of the said deed of apprenticeship, and that, if the instruction to the respondent was to be confined to Mansfield, the reasonable construction to be placed upon the said deed of apprenticeship was that the appellant would instruct at Mansfield so long as the exigencies of the trade would allow.

The magistrates, however, were of opinion that the appellant was bound to carry out the said deed of apprenticeship at Mansfield in the county of Nottingham and not elsewhere, and accordingly adjudged that the appellant should pay to the respondent 16*s.* for damages and costs.

The question of law for the Court was as follows: Is the said deed of apprenticeship to be carried out at Mansfield, where all the parties to it were living when it was entered into, or is it to be carried out at Leicester, at which place Royce, Gascoine, & Co., Limited (of which company the appellant is such managing director as aforesaid), carry on business, or at any other town within reasonable distance from Mansfield the appellant may think fit to name? If the Court were of opinion that the said deed of apprenticeship ought to be carried out at Mansfield aforesaid, then the said adjudication was to stand and remain in full force; otherwise it was to be quashed.

Bray, for the appellant. There is no express provision in the apprenticeship deed that the service is to be at Mansfield. It would not be reasonable to imply such a provision. The master may find that he can more profitably carry on his business elsewhere, and it cannot be supposed that it was contemplated by the deed that he should be precluded from so doing.

Clement Higgins for the respondent. The master is described

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in the deed as "of Mansfield," and it is contended that giving the deed a reasonable construction these words are more than mere description. If not, then the deed does not expressly provide any place where the engagement is to be carried out. But some such provision must in reason be implied. Could it be contended for as a reasonable construction that the master could claim to carry out the engagement anywhere, at any distance from the place where it was entered into? The mother undertakes to provide the apprentice with food, clothes, and lodging, which she might easily do at Mansfield, the place where all the parties then lived. The burthen of this undertaking may be altogether different if she is bound to do so at some distant place. The reasonable construction seems to be that all parties contemplated Mansfield as the place for the performance of the engagement. If the construction be that it must be performed within a reasonable distance, there is no finding that Leicester is within a reasonable distance, and it must be taken that the magistrates found the contrary.

Bray, in reply. The magistrates decided that the contract must be performed at Mansfield. If that ruling was wrong, by the terms in which the question in the case is stated, the judgment is to be for the appellant.

GROVE, J. I am of opinion that the decision of the magistrates must be reversed. There may, no doubt, be some hardship involved in the result, and very likely the parties did not at the time when the deed of apprenticeship was entered into contemplate the removal of the business, but we must construe the deed as we have it before us. The deed contains no provision as to the place where the business is to be carried on, and I do not think we can imply a condition that it was to be carried on at Mansfield as suggested by the respondent's counsel. The strongest argument for that construction arose from the condition that the mother was to provide the apprentice with food and lodging. It was suggested that great hardship might ensue if the result was that she had to perform that stipulation elsewhere than at Mansfield. But after all such a suggestion depends upon little more than conjecture. I do not think that, on the strength of matter so entirely extraneous to the deed itself, we can import

such a condition as is suggested into it. To do so would be making the contract such as we think it ought to have been, not taking it as it is. For these reasons I think our decision must be for the appellant.

BOWEN, J., concurred.

Decision reversed.

Solicitors for appellant: *Torr & Co., for Wells & Hind.*
Solicitors for respondent: *Johnson & Weatheralls.*

E. L.

DALRYMPLE *v.* LESLIE.

Nov. 10.

Practice—Interrogatories—Written Document—Whether Party interrogated can be compelled to state his recollection of Contents of written Documents not in his Possession.

In an action for libel, one of the plaintiff's interrogatories required the defendant to state whether she had not written and sent letters to a third person making certain defamatory statements of the plaintiff set out in the interrogatory, or statements to the same purport and effect, and to set out as fully as she could what her statements were. The defendant answered that to the best of her recollection and belief she never wrote any letter making the statements set out in the interrogatory, "or any of those exact statements;" that she did write a letter to the third person, but that she had no copy of it, and was unable to recollect "with exactness" what the statements contained in it were:—

Held, that the answer was sufficient.

MOTION, by way of appeal from the decision of Lindley, J., refusing to order the defendant in an action for libel to make a further and better answer to the plaintiff's second interrogatory.

The second interrogatory was (so far as is material) as follows: "State whether you wrote and sent any letter or letters to her Grace, and if so, when, making the statements hereinafter set out and marked A—H, or any and which of the same, or any and which part of any and which of the said statements, or to the same and what purport and effect as the said statements, or any and which of them, or any and which part of any and which of them? Set out as fully as you can also what your said statement or statements were, and if you have a copy or copies of any such letters, make a copy thereof an exhibit to your answer."

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A number of statements concerning the plaintiff, some of them of a defamatory character, were then set out, and marked with the letters A to H.

The defendant's answer was as follows:—

2. "In answer to the second of the said interrogatories, I say that to the best of my recollection and belief I never wrote and sent any letter or letters to her Grace, making the statements in the second of the said interrogatories set out and marked A—H or any of those exact statements. I did write a letter to her Grace in August or September, 1879, but on what exact date I cannot say. I kept no copy and have no copy of the said letter, and I am unable to recollect with exactness what the statements contained therein were. And I object further to answer this interrogatory on the ground that it is irrelevant, inadmissible, and otherwise objectionable, and I submit that I should not be required to set out what the statements in the letter were, unless I could do so with exactness."

Cock, for the plaintiff. The defendant should be ordered to make a further and better answer to the interrogatory. It has long been the Chancery practice to allow interrogatories like this. The practice is stated in Daniell's Chancery Practice, 5th ed. vol. i. 305, 306, and since the Judicature Acts, where there is a conflict, the rules of Equity are to prevail. The defendant ought to have stated the substance of the letter to the best of her recollection. There is no distinction between libel and slander in this respect. It is consistent with her answer that she may only be unable to recollect some unimportant expressions. There is no authority on the point.

Barnes, for the defendant, was not heard.

GROVE, J. The question in this case arises upon the answer to the second interrogatory. We are asked to say whether it is a sufficient answer, or whether, in effect, the defendant can be required to set out what she recollects of the contents of the letter which is not in her possession. I think she ought not to be compelled to make a further answer. It might put her in a most dangerous position, and enable the plaintiff to gain an

unfair advantage. She states in terms that she never made the statements complained of, although no doubt it is consistent with the answer that she may have made statements amounting to much the same thing. But if she is to be compelled to state from memory what were the contents of the letter, then, assuming that she answered truly to the best of her recollection, she might state expressions of a more libellous character which would tell more strongly against her, than those actually used; or she might suppose the expressions to have been of a much less libellous character, and in that case her evidence might be stigmatised as false. She says that she has no copy of the letter, and cannot recollect with exactness what were its contents. I think that is as much as a person can fairly be called upon to say. Unless bound by legal decisions I shall not hold that her answer is insufficient. To compel her to state her recollection might work unfairly to her in aggravating damages, if, when she was in the witness box, there was a discrepancy between her answer to the interrogatory and the contents of the letter. It is said that we are literally and absolutely bound by the Chancery practice, but I can find no decision which goes to that length. No doubt the words of s. 25, sub-s. 11, of the Judicature Act, 1873, are that "generally" the rules of Equity are to prevail, but it has never been decided how far the practice in Chancery with respect to interrogatories is to prevail. It was important in Chancery matters where the evidence was documentary that there should be stringent powers of getting the truth out, but different considerations apply to an action at common law where interrogatories are only preliminary to the trial, and for the purpose of saving expense by obtaining admissions, and where oral evidence, subject to cross-examination, is the mode of getting at the truth. It is not, however, necessary to decide whether we are bound entirely by the Chancery practice in this matter because the interrogatory itself is not objected to, but only the sufficiency of the answer. I am of opinion that the defendant's answer is sufficient.

BOWEN, J. I am of the same opinion. This is not a question of discretion, but of right. As a matter of right is the plaintiff entitled to the information he seeks, or is the defendant entitled

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to refuse to give it? The plaintiff is suing for damages for libel. His second interrogatory assumes that the letter is in the possession, not of the defendant, but of some other person—it may be in the plaintiff's own possession. Can the plaintiff compel the defendant to state her recollection of the contents of a document not in her possession of the non-production of which to her no primâ facie explanation is given, and with respect to which she swears she has no exact recollection? I desire to say nothing against the useful practice of simplifying proof by obtaining admissions through interrogatories, even as to written documents. But down to the passing of the Judicature Acts the rule at common law certainly was that, where a person was asked on interrogatories to verify the contents of an existing written document not in his possession, a demand to see the document before he answered was always allowed. I do not think the Judicature Acts have altered that rule, nor do I think that any law or authority exists by which a person can be compelled to set out his imperfect recollection of a document not produced for his inspection, which is not suggested to be lost or beyond the jurisdiction of the Court, or which, for anything that appears to the contrary, might even be in the possession of the interrogating party. It is said that the practice in Chancery compels him, and that an opponent is now entitled, by means of interrogatories, to get such secondary evidence, without accounting primâ facie for the non-production of the original. I do not think that the passage cited from Daniell's Practice proves that the Chancery practice goes the length contended for on behalf of the plaintiff. No case has been cited before us to shew what the Courts of Chancery would have held in a case like the present. I believe that up to this moment no such practice has prevailed at law, and I am strengthened in my doubt as to the Chancery practice by the fact that Lord Justice Lindley, who refused to order the defendant to make a further answer here, is himself a distinguished equity lawyer. I think his decision was right, and that this motion ought to be refused.

Motion refused.

Solicitor for plaintiff: *C. J. Eyre.*

Solicitors for defendant: *Burton, Yeates, & Hart.*

W. A.

BARKER *v.* PALMER.

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Nov. 15.

Practice—Time—County Court—Action to recover Lands—Delivery of Summons to Bailiff—County Court Rules, 1875, *Order VIII., rule* 7—*Jurisdiction—Appeal—Prohibition.*

By Order VIII. rule 7 of the County Court Rules, 1875, "the summons in an action brought to recover lands shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof." The plaintiff in an action in the county court to recover lands delivered the summons to the bailiff thirty-nine clear days, and the bailiff served it upon the defendant thirty-eight clear days, before the return day. At the hearing the county court judge ruled that the service was good, and tried the case, giving judgment for the plaintiff:—

Held, that the provision in rule 7 with respect to the time of delivering the summons to the bailiff was obligatory, and not merely directory, and therefore that the judge ought not to have tried the case.

Held, also, that the defendant's proper remedy was to appeal from the judge's ruling, and not to apply for a prohibition against the issue of execution on the judgment.

CAUSE shewn against a rule for a new trial obtained by the defendant, by way of appeal from the ruling of the Judge of the County Court of Hertfordshire.

The plaintiff brought his action under s. 11 of the County Courts Act, 1867, to recover lands.

The summons was delivered to the bailiff for service on the 2nd of June, 1881, and was served by him upon the defendant on the following day.

The return day named in the summons was the 11th of July. At the trial the objection was taken for the defendant that the service of the summons was bad, and that the county court judge had no jurisdiction to hear the case, by reason of the plaintiff having failed to comply with the terms of rule 7 of Order VIII. of the County Court Rules, 1875, which requires the summons, in case of an action brought to recover lands, to be delivered to the bailiff forty clear days before the return day.

The judge overruled the objection and tried the case, giving judgment for the plaintiff.

Lindsell, for the plaintiff. First, the defendant's contention being that the county court judge had no jurisdiction to hear the

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case, his proper remedy was to apply for a prohibition against the issue of execution, and not to appeal from the judge's decision. The county court judge is entitled to be heard in the matter, and there is a right of appeal from the grant of a prohibition by this Court, of which right the plaintiff has been deprived through the defendant not having adopted his proper remedy. Secondly, the decision of the county court judge was right. The object of the first part of rule 7 is merely to allow the bailiff a sufficient time to effect service of the summons upon the defendant. Here the bailiff, having in fact served the summons thirty-five days before the return day, has waived compliance with the terms of the first part of the rule. [He cited *Liverpool United Gaslight Co.* v. *Overseers of the Poor of Everton* (1); and *Jackson* v. *Beaumont.* (2)]

Guiry, for the defendant, supported the rule. The judge's decision was on a matter of procedure incidental to the jurisdiction he had over the subject-matter of the action. An appeal is therefore the proper remedy. Prohibition only lies where a court acts without any jurisdiction over the subject-matter before it. The terms of Order VIII. rule 7, are express with respect to the times mentioned in the rule. There is no power to extend the time: *Brown* v. *Shaw* (3); *Tennant* v. *Rawlings* (4); and the Court cannot hold one part of the rule obligatory, and the other directory, where the language is the same in both. [He also referred to *Williams* v. *Swansea Canal Navigation Co.* (5)]

GROVE, J. I am of opinion that this appeal must be allowed. I think the county court judge was wrong in hearing the case. In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held only directory. The rule is, that provisions with respect to time are always obligatory unless a power of extending the time is given to the Court, and there is no such power here. In the present case the latter part of rule 7 was complied with, but not the former. It is to be observed that the word "shall" is used with respect both to the time of delivery to the bailiff and of the

(1) Law Rep. 6 C. P. 414.
(2) 11 Ex. 300.
(3) 1 Ex. Div. 425.
(4) 4 C. P. D. 133.
(5) Law Rep. 3 Ex. 158.

service on the defendant. A reason is suggested for holding the rule to be directory merely in the one case and obligatory in the other; it is said that the period of forty days is fixed only in order to allow the bailiff a reasonable time to serve the summons, whilst the period of thirty-five days is fixed for the protection of the defendant. It is also said that the bailiff has in fact served the summons within the proper period, and therefore has waived compliance with the rule. It is impossible for the Court to speculate upon the reasons for legislation in the way suggested, or to dissect an Act of Parliament and say upon those reasons that part of an enactment is directory and part obligatory. The reasons suggested might be wholly wrong, and to act upon them here would be practically to abrogate the rule. The words of the rule are peremptory, and give no more discretion with respect to the delivery to the bailiff, than with respect to the service of the summons.

As to the defendant's remedy by prohibition, I do not think it necessarily follows that an appeal will not lie because there is a remedy by prohibition. There is a passage in Comyn's Digest (title Prohibition, bk. 7, D. p. 140), which, though perhaps it does not apply to every case, tends to shew that there may be an appeal even although prohibition will lie, and it would also appear, from the same authority, that the appeal takes precedence of the remedy by prohibition. The County Court Act, 1850 (s. 14), gives an appeal in the largest terms, where a party is dissatisfied with the direction or determination of the Court "in point of law." Therefore, assuming prohibition would lie, I see nothing here to take away the right of appeal. But I am inclined to think that the defendant has not a remedy by prohibition. I never heard that prohibition would lie where a question of time merely was involved. All the practice has been to the contrary. There is much in Comyn's Digest (tit. Prohibition) to shew that, in general, prohibition lies where a Court has acted without having any jurisdiction whatever over the subject-matter of the action. Here the county court judge had jurisdiction over the subject-matter, subject to certain rules with respect to time which were incident to that jurisdiction. I think, therefore, that prohibition does not lie here; that, even if it does, the defendant has a right

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of appeal; that the county court judge was wrong in hearing the case, and that this rule should be made absolute.

LOPES, J. I am of the same opinion. I think the true construction of rule 7 is, that the summons *must* be delivered to the bailiff forty clear days before the return day thereof, and *must* be served thirty-five clear days before the return day. It is impossible to hold that the latter part of the rule is obligatory and the former directory merely. I therefore think that the county court judge was wrong in proceeding to hear the case. The whole question being one of procedure, it appears to me that the judge's ruling was upon a matter of law incident to his jurisdiction, and that an appeal can therefore be brought.

Rule absolute.

Solicitors for plaintiff: *Philpot & Son, for Hawkins & Lindsell, Hitchin.*

Solicitors for defendant: *Brown & Woolnough, for Dumville, St. Albans.*

W. A.

Nov. 15.

[IN THE COURT OF APPEAL.]

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF ROCHDALE *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER.

Highway—Repair—Disturnpiked Roads—Main Roads—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.

11 Q.B.D. 475

The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), by s. 13, enacts that any road which has "between the 31st of December, 1870, and the date of this Act ceased to be a turnpike road" . . . . "shall be deemed to be a main road, and one half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road, shall, as to every part thereof which is within the limits of any highway area be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate."

The corporation of the town and borough of R., was the highway authority of the R. highway area. Under ss. 47–50 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), such portions of the turnpike roads entering R. as

came within the area of the "town" were taken out of the turnpike trusts, and the obligation to repair the same was imposed upon the corporation. By a local Act in 1872, the boundaries of the borough were enlarged and all the provisions of the Acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that the further portions of the turnpike roads, thus for the first time brought within the area of the borough, were taken out of the turnpike trusts by the operation of the Towns Improvement Clauses Act, 1847, and ceased to be turnpike roads :—

Held, reversing the decision of the Queen's Bench Division, that these portions, which had so ceased to be turnpike roads, were main roads within s. 13 of the Highways and Locomotives (Amendment) Act, 1878, and that consequently the county authority were liable to pay half the expenses of their maintenance.

APPEAL from the judgment of the Queen's Bench Division on a special case.

The facts fully appear in the report of such judgment (1), and are shortly as follows. The plaintiffs, who are the highway authority of the Rochdale highway area, claimed of the defendants, the county authority of the county of Lancaster, half of the expenses of maintaining certain portions of turnpike roads included within the said highway area, which had, as the plaintiffs contended, ceased to be turnpike roads, and had become main roads within the meaning of s. 13 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77). That section enacts, inter alia, that "any road which has within the period between the 31st of December, 1870, and the date of the passing of this Act ceased to be a turnpike road, and any road which being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate," &c.

The town of Rochdale before its incorporation (which was by Royal charter in 1856), was governed by commissioners under a local Act, viz., the Rochdale Improvement Act, 1853, and the territorial limits of the "town" as defined by that Act were

(1) 6 Q. B. D. 525.

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declared to be all places within a radius of three-quarters of a mile from a defined point in the old market-place there.

By this Act the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 47, 48, 49, and 50, were, inter alia, incorporated therewith, and by these sections the commissioners had the management, and became the surveyors, of all highways within the limits of the town, and were liable to be indicted for refusing or neglecting to repair the same, and the trustees of any turnpike road were not to collect any toll on any road within such limits.

Upon the incorporation of the town all the rights, powers, and liabilities of the commissioners were transferred to the new corporation. Several of the roads entering Rochdale were turnpike roads, and under ss. 47 to 50 of the Towns Improvement Clauses Act, 1847, such portions of them as came within the area of the town were taken out of the turnpike trusts, and the obligation to repair the same was imposed upon the corporation.

By another local Act (the Rochdale Improvement Act, 1872), passed in 1872, the boundaries of the borough were enlarged and all the provisions of the Acts relating to the "town" were extended to and made applicable to the enlarged area of the borough. The effect of this was that the further portions of the said turnpike roads, thus for the first time brought within the area of the borough, were taken out of the turnpike trusts by the operation of the Towns Improvement Clauses Act, 1847, and ceased to be turnpike roads, and the question was whether they had so ceased and had become main roads, within the meaning of the said s. 13 of the Highways and Locomotives (Amendment) Act, 1878, so as to entitle the plaintiffs, the highway authority of the area in which they were situate, to claim from the defendants, the county authority, half of the expenses of their repair.

The Queen's Bench Division were of opinion that such portions of the roads had not ceased within the meaning of that section to be turnpike roads so as to have become main roads, and they therefore gave judgment for the defendants.

The plaintiffs appealed.

Sir H. Giffard, Q.C. (*Crump*, with him), for the plaintiffs.

Gorst, Q.C. (*H. F. Blair*, with him), for the defendants.

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LORD COLERIDGE, C.J. I am unable to agree with the judgment of the Court below. It seems to me that upon the true construction of the 13th section of the Highways and Locomotives (Amendment) Act, 1878, "road" means any portion of a road as well as a whole road, and therefore that if any such portion shall cease to be a turnpike road it shall be deemed to be a main road. It is indeed difficult to say what is a road. In the old days the road from London to York ran over, I suppose, several turnpike trusts which were not conterminous with the whole road, but covered various portions of it. The road in that case in one point of view might be considered the whole road, and in another point of view any portion of it might be considered a road. It seems to me that the 13th section means that when any portion of a road which is subject to a turnpike trust comes, as in the present case, within the area of a borough, and is repaired by the borough authority, and the power to take tolls in respect of it is gone, then such portion ceases to be a turnpike road and becomes a main road, and the 13th section comes into operation.

On that short ground, I think the judgment in this case must be reversed.

BRETT, L.J. I think that the turnpike road in this case was made shorter by taking off the part of it which came within the new limits of the borough. The turnpike road which remains is that part of the road which is now outside such limits, and that part which is now within has ceased to be a turnpike road, and consequently is now a main road.

COTTON, L.J. I am of the same opinion. A road which had formerly been repaired at the expense of a turnpike trust came to be repaired by the local highway authority. Then why should not s. 13 of the Highways and Locomotives (Amendment) Act, 1878, apply? It is said that it should not, because the portion of the road which came within the limits of the borough was not a turnpike road, but only part of a turnpike road. Now, in my opinion, it was a turnpike road, though not the whole of the road, and that it ceased to be a turnpike road and came within the

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meaning of the enactment. The statute does not say if a road ceases to be subject to a turnpike trust it is to be a main road. In my opinion, the 13th section may apply to a portion of the road, although the whole of the turnpike trust has not ceased, but only the trust to which such portion was subject. It is said that "cease" in the enactment means by expiration of the trust, but, I think, there is nothing in the section to limit its application to a road ceasing to be a turnpike road by the expiration of the trust.

There is another point to which I wish to refer. It is said that there is a provision in the Towns Improvement Act for providing for the expense of keeping up this portion of the road out of a particular fund. Now if there had been such a provision, which could be construed as saying that such expenses should not be provided for in any other way than out of a particular fund, there would have been much force in such argument; but there is nothing in that Act to warrant any such construction. It makes the commissioners liable to repair the highway, and to be indicted for neglecting to do so, but there is nothing which says that the expense shall be borne out of a particular fund, and out of no other; and although the commissioners are made liable to repair, they are put in the same position as any other highway authority, and there is nothing to prevent them from calling upon the county for the payment of their proportion of the expenses incurred in the repair of the said road.

BRETT, L.J. This decision makes it unnecessary to determine the second point which was taken, namely, whether supposing the 13th section does not apply to this portion of the road until the turnpike trust has expired, it does apply when the trust has run out.

Judgment reversed.

Solicitors for plaintiffs: *Norris, Allens, & Carter, for Z. Mellor, Rochdale.*

Solicitors for defendants: *Ridsdale, Craddock, & Ridsdale, for F. C. Hulton, Preston.*

W. P.

THE SOUTH WESTERN LOAN AND DISCOUNT COMPANY *v.* ROBERTSON.

1881
Nov. 21.

Charging Order—1 & 2 *Vict. c.* 110, *s.* 14—"*In trust for him*"—*Stock vested in Trustees for Judgment Debtor and others*—*Interest determinable on Alienation*—*Chargeable interest.*

An order was made under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, charging a judgment debtor's interest in the dividends on certain bank stock. It appeared that by the terms of a will certain property, including this stock, was bequeathed to trustees on trust as to one moiety thereof for the testatrix's niece, and as to the other moiety in trust to pay the income thereof to her nephew, the judgment debtor, for life, or until he should attempt to alien or charge the same. And, upon his interest determining, there were limitations over in favour of his wife for life, and after her death in favour of his children, with an ultimate remainder in the event of the failure of the preceding trusts to the judgment debtor absolutely. At the time when the charging order was made, there was a dividend on the stock accrued due, but which the trustees had not yet received from the bank:—

Held, that the fact that the stock stood in the name of the trustees in trust for another, besides the judgment debtor, did not prevent its being stock "standing in the name of any person in trust for him," within the words of 1 & 2 Vict. c. 110, s. 14.

Held, also, that the accrued dividend and the ultimate remainder to the judgment debtor after failure of the preceding trusts constituted a sufficient chargeable interest, whatever might have been the case with regard to the interest determinable on alienation, if that had stood alone; and that the order was therefore rightly made, the trustees being responsible upon its being made for the due application of the fund according to the legal effect of the order, whatever it might be.

THIS was an application to set aside an order made by Mathew, J., at chambers.

The plaintiffs having recovered judgment against the defendant, the learned judge had made an order under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, that the defendant's interest in the dividends on a sum of 2573*l.* Bank Stock, standing in the names of certain persons as trustees, should be charged with payment of the judgment debt. It appeared that the judgment debtor's aunt had, by her will, bequeathed her personal estate, of which the stock in question formed part, to trustees on certain trusts as to one undivided moiety thereof for a niece, and as to the other or remaining moiety or equal half part or share of the trust

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premises on trust to pay the annual income thereof to her nephew, the judgment debtor, during his life, or until he should alien, charge, or incumber, or attempt to alien, charge, or incumber the same. Upon the determination of his interest by death or attempt at alienation, trusts in remainder, were to arise for the benefit of the judgment debtor's wife for life, and after her death, for the benefit of his child or children, the interest of such child or children vesting upon the attainment of the age of twenty-one, with an ultimate remainder, in the event of the previous trusts failing, to the judgment debtor absolutely.

It appeared that at the date of the charging order there was a dividend accrued due upon the stock, but which the trustees had not yet received.

Nov. 19. *Tindal Atkinson*, on behalf of one of the trustees, moved by way of appeal against the order of Mathew, J. The order is bad on two grounds: First, the words of 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, do not cover such an interest as this. The latter statute extends somewhat the words of the former; but the stock or fund to be within either of the enactments must, by the terms of 1 & 2 Vict. c. 110, s. 14, be standing in the name of the judgment debtor in his own right, or in the name of some person in trust for him. Here the stock was not standing in the name of the trustees in trust for the judgment debtor, but in trust for the judgment debtor and others. In *Dixon* v. *Wrench* (1) Bramwell, B. says that the stocks must be standing in the judgment debtor's own name in his own right, or the name of some person in trust for him, so that he could sell them himself or direct the trustee to sell them. That would not be the case here.

Secondly, this order charges an interest which the judgment debtor has no power to alien or charge. By the terms of the Act the charging order is to have the same effect as if the judgment debtor charged the stock himself. He has in this case no power to charge. The provisions of the will are in substance equivalent to a restriction on alienation, as in the case of a married woman,

(1) Law Rep. 4 Ex. 158.

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whose interest cannot be charged when she is restrained from alienating: *Stanley* v. *Stanley* (1); *Pike* v. *Fitzgibbon*. (2)

Finlay, on behalf of the judgment creditors, shewed cause. It is not necessary, in order to satisfy the words "in trust for him," that the stock should stand in the names of the trustees in trust for the judgment debtor alone. The stock does stand in their names in trust for him, and it makes no difference that others are interested in it as well. With regard to the second point, it is clear law that there cannot be a restraint on alienation except in the case of a married woman. The order may possibly have the effect of an alienation by the judgment debtor himself, and bring the subsequent trusts into operation; but to say that, therefore, it cannot be made is to give the provisions of the will the effect of a restraint on alienation which is unknown to the law except in the case of a married woman. It is clear, moreover, that there is a chargeable interest in respect of the accrued dividend and the ultimate remainder to the judgment debtor. That being so, the order was rightly made. It will affect the judgment debtor's interest whatever it may be; but what the effect of the order may be, and how far it will operate, is for the trustees to ascertain, and does not concern the judge who makes the order or this Court: see *Fowler* v. *Churchill* (3) and *Churchill* v. *Bank of England*. (4) The order does not restrain the Bank of England from paying the dividends to the trustees, and the trustees are the parties to see to the proper distribution of them.

[He also cited *Montefiore* v. *Behrens* (5) and *Roffey* v. *Bent* (6).]

Tindal Atkinson, in reply, cited *Cooper* v. *Wyatt*. (7)

Cur. adv. vult.

Nov. 21. GROVE, J. I have not been without doubt during the course of the argument, but on the whole I am of opinion that we ought not to set aside the order of Mathew, J. The question turns to a great extent upon the terms of the will under which the

(1) 7 Ch. D. 589.
(2) 17 Ch. D. 454.
(3) 11 M. & W. 57; 2 Dowl. (N.S.) 562.
(4) 11 M. & W. 323; 2 Dowl. (N.S.) 767.
(5) 35 Beav. 95.
(6) Law Rep. 3 Eq. 759.
(7) 5 Madd. 482.

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judgment debtor takes the interest sought to be charged. By that will the testatrix left her personal estate to trustees upon trusts as to one moiety in favour of her niece, and as to the remaining moiety on trust to pay the annual income thereof to her nephew, the judgment debtor, during his life, or until he should alien, charge, or incumber, or attempt to alien, charge, or incumber, the same. Upon his aliening, charging, or incumbering, or attempting to do so, other trusts come into effect for the benefit of his wife during her life, and then for the benefit of his children attaining twenty-one years and, in default of any such objects of the trust, or if none such shall attain a vested interest, then there is an ultimate trust for the benefit of the nephew. We have no affidavit as to whether the wife is living or dead or whether there are any children or not. By the terms of the will, however, it is clear that, in case the judgment debtor attempts to alien or charge his interest, it passes from him, but there is a remainder to him if the intermediate trusts fail. The argument against this order may be divided into two parts. The first contention was that the statute, 1 & 2 Vict. c. 110, s. 14, gives no power to the judge to make this order, because this fund was not standing in the judgment debtor's name, nor in the name of any person in trust for him, but was standing in the name of persons who were trustees for him and for others besides him. Looking to the words of the section and the authorities I am of opinion that this argument will not hold good. The words of the section relied upon do not seem to me to bear the construction suggested, and the section expressly enables the judge to make the charging order on the stocks, funds, &c., or such of them, or such part thereof respectively as he shall think fit. I think that in this case he had power to charge the debtor's interest in the moiety of the stock. In this view I am confirmed by the decision in the case of *Fowler* v. *Churchill* (1) and *Churchill* v. *Bank of England.* (2) It seems to me that the words of the section fairly construed meet this case and that the scope and intention of the Act clearly includes it. If the argument were correct, the section never could apply where a fund stands in the name of trustees in

(1) 11 M. & W. 57; 2 Dowl. (N.S.) 562.

(2) 11 M. & W. 323; 2 Dowl. (N.S.) 757.

trust for more than one beneficiary, and in a very large number of cases therefore the Act would become inoperative. In the case of *Fowler* v. *Churchill* (1) and *Churchill* v. *Bank of England* (2) more than one person was interested in the funds charged, but the Court held that the order could be made.

The second and principal contention against this order was based on the provisions of the will by which, if the judgment debtor aliens or charges, or attempts to alien or charge, his interest, it determines and other interests in remainder arise. That argument had at first a good deal of effect on my mind, and I should feel greater difficulty than I do but for the cases that have been cited to shew that the onus of giving effect to the order is thrown on the trustees. It seems to me that the result is that we are not concerned to go further into the matter than to see whether there is any interest of the judgment debtor with respect to which the order can be made. Now, but for the existence of an accrued dividend, and the ultimate interest in the judgment debtor, I should have felt some doubt as to making the order, for in general a judge would not issue an order when from the nature of the case the order could have no effect. But it appears that before the order was made a dividend had accrued due, which the trustees were bound to pay over to the judgment debtor and upon which the clause as to alienation can have no effect. It is money to which the judgment debtor has become entitled absolutely, and to which that clause cannot attach. Charging a sum of money already accrued due cannot be an alienation within its meaning. By the terms of the section the charging order is to have the same effect as if the judgment debtor had himself charged the property, and this sum of money the judgment debtor had power to charge. It is clear, therefore, that the objection raised does not apply to the dividend already accrued due, and the order therefore would stand good as to that. There is also another matter with regard to which the order may be supported. By 3 & 4 Vict. c. 82, the provisions of 1 & 2 Vict. c. 110, s. 14, are extended to the interest of any judgment debtor whether in possession, remainder, or

(1) 11 M. & W. 57; 2 Dowl. (N.S.) 562.

(2) 11 M. & W. 323; 2 Dowl. (N.S.) 757.

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reversion, or whether vested or contingent as well in any such stocks, funds, &c., as also in the dividends, interest, or annual produce thereof. In this case there was an ultimate interest in the stock given to the judgment debtor which was contingent upon the failure of the preceding trusts, and there is nothing to shew that that interest may not take effect. What the value of that interest may be is doubtful, but it is an interest, and chargeable as such. It seems to me, therefore, that by reason of the existing dividend, and this ultimate interest of the judgment debtor, the judge had power to make this order. What the effect of the charge may be is a question for the trustees to consider, for in *Fowler* v. *Churchill* (1), *Churchill* v. *Bank of England* (2), the Court held that when the order was made the Bank of England must still pay the dividends to the executors, and the executors were fixed with the charge and bound to act upon it. Lord Abinger in giving judgment says:—"When the judge's order is made absolute the executors are chargeable with the proper distribution of the money, and the bank is bound to pay it over to them. It would be impossible for the bank to carry on its business if we were to hold it bound to see to the proper appropriation of the money under every order charging stock." Parke, B. said:—"I am of the same opinion. As soon as the judge's order is absolute the executors are liable in the same manner as if the dividends had been charged by a deed." Alderson, B. said:—"When the order is made absolute it is in the nature of a charge upon the fund. The bank is then to pay the money to the trustees, who are bound to see that it is properly applied. The bank has nothing to do with the distribution of the fund, and is not bound to pay the judgment creditor; that is the business of the trustees, who are responsible in a court of equity for its proper distribution."

I need only in conclusion refer to the case of *Dixon* v. *Wrench*. (3) That case is, I think, distinguishable from the present case. There, the trustees had trusts to perform prior to those in favour of the judgment debtor, viz., trusts for the pay-

(1) 11 M. & W. 57; 2 Dowl. (N.S.) 562.

(2) 2 Dowl. (N.S.) 767; 11 M. & W. 323.

(3) Law Rep. 4 Ex. 154.

ment of debts and legacies, and for sale of the estate, and the Court held that the interest of the judgment debtor was too remote to be charged, he having no interest in the stock or shares but only in their produce after the performance of the prior trusts. Bramwell, B., in giving judgment, says: "Now here the stock and shares are neither in the name of the debtor nor of a trustee for him, but, to put the case most favourably for the plaintiff, in the name of the executors, who hold them not in trust for the defendant in the same sense in which the Act uses the word, but in trust to sell. As to the case of *Cragg* v. *Taylor* (1) I think the decision right, and I agree with the distinction drawn by the Chief Baron, and which is indicated by his judgment in that case, where he states that the fifth trust of the shares was for the defendant and his assigns. That was only a contingent interest, but it was nevertheless sufficient to make the shares in question shares standing in the name of another in trust for him." The case of *Dixon* v. *Wrench* (2) is clearly distinguishable both from *Cragg* v. *Taylor* (1) and the present case. For these reasons I am of opinion that the order was right and should be affirmed.

LOPES, J. I also think that the order should be affirmed. This case presented to my mind considerable difficulty until the case of *Churchill* v. *Bank of England* (3) was cited. Since that case was cited, it has appeared to me clear what our decision should be. The question raised is whether the judgment debtor has a chargeable interest in certain dividends. The judge at chambers decided that he had. It was contended before us that there could be no charging order because the judgment debtor was not interested solely, but jointly with another, and, for this reason, it was said that neither of the enactments, viz., 1 & 2 Vict. c. 110, s. 14, nor 3 & 4 Vict. c. 82, applied. The 1 & 2 Vict. c. 110, s. 14, speaks of stocks, &c., "standing in his own name, in his own right, or in the name of any person in trust for him." It was urged that this provision is intended to apply only where funds are standing in the person's own name, or in the name of a trustee for one person

(1) Law Rep. 2 Ex. 131. (2) Law Rep. 4 Ex. 154.
(3) 11 M. & W. 57, 323.

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solely interested, and that it has no application if the trustee is trustee for more than one cestui que trust. I cannot put that narrow construction upon the words, and I cannot think that that could have been the intention. The consequences would be very inconvenient. The Act, if so, could never apply where the funds were left in moieties or there were several beneficiaries, nor even it would seem, where the judgment debtor had made an assignment of part of his interest. I agree with the conclusion come to by my Brother Grove on this point. Then, with regard to prospective dividends and the effect of the provision against alienation, the case was put as being similar to that of a married woman who is restrained from anticipation. I do not think that a married woman's case is at all similar to the present. The restraint on anticipation in the case of a married woman depends entirely on the doctrines of the Court of Chancery with regard to the position of a married woman. In the case of a man there is no personal disqualification. In the case of a married woman restrained from anticipation there may be no power to make a charging order, but the same reasoning would not apply, as it seems to me, to the case of a man. It is unnecessary, however, in my opinion, to go into that question. The same difficulty does not apply with regard to the dividend already accrued due or the ultimate interest. I am clearly of opinion that there was in respect of those matters an interest that could be charged, and that therefore this order was rightly made.

Appeal dismissed.

Solicitors for applicant: *Blake & Snow.*
Solicitor for judgment creditors: *Attenborough.*

E. L.

IN THE MATTER OF THE APPLICATION OF FOSTER AND ANOTHER *v.* THE GREAT WESTERN RAILWAY COMPANY.

1881
Nov. 21.

Costs—Railway Commissioners—Successful Defendant ordered to Pay unsuccessful Applicant's Costs—Regulation of Railways Act, 1873 (36 & 37 *Vict.* c. 48), s. 28.

The Railway Commissioners have jurisdiction under the Regulation of Railways Act, 1873, s. 28, to order a railway company, in whose favour they have decided upon an application to them against such company, to pay costs to the unsuccessful applicant.

8 App Cas 386
24 Ch D 273
277

Cited on appl (post 515) Ca.

THIS was an application on the part of the Great Western Railway Company for a rule to stay the master from taxing the costs, under an order of the Railway Commissioners in the matter of an application of Messrs. Foster against the railway company, or in the alternative for a writ of prohibition, to prevent the Railway Commissioners or Messrs. Foster from proceeding further on the said order. The facts sufficiently appear from the judgment.

June 25. *Webster, Q.C.*, and *R. S. Wright*, for the company, moved for a rule as above. The Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 28, gives the Railway Commissioners discretion as to the costs of proceedings before them, but this provision cannot be construed as meaning that they should have power to award costs to an unsuccessful applicant against successful defendants. There are many cases in which a successful plaintiff has been ordered to pay the costs of an unsuccessful defendant, but the reason of that is that the plaintiff is the moving party in the litigation. The defendant is dragged into Court. There may be jurisdiction to deprive a successful defendant of costs, but not to make him pay them to the plaintiff. Neither in the Court of Chancery under the old practice nor in the High Court of Justice under the Judicature Acts, has such a jurisdiction ever been exercised in cases where the Court has discretion as to the costs. [They cited Daniell's Chancery Practice, 1238: *Clarke* v. *Hart* (1); *Cooth* v. *Jackson*. (2)]

(1) 6 H. L. 633, 667. (2) 6 Ves. 11, 40.

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H. Matthews, Q.C., and *Anstie*, for the Messrs. Foster, shewed cause. The cases in the Court of Chancery and under the Judicature Act have no application to the present case. They shew that the jurisdiction of the Court of Chancery was exercised according to the precedents or established practice in that Court, and according to what rules the discretion of the Court would be exercised, but they did not involve any question of jurisdiction. The same observations apply to the decisions under the Judicature Acts and Orders. The Railway Commissioners are given an unfettered discretion as to costs by the Regulation of Railways Act, 1873, s. 28, and this Court will not interfere with the mode in which they exercise this discretion if they have jurisdiction. [They cited *Harris* v. *Petherick.* (1)]

Webster, Q.C., in reply, cited *Edwards Wood* v. *Majoribanks* (2); *Norman* v. *Johnson* (3); *Burrell* v. *Delevante.* (4)

Cur. adv. vult.

Nov. 21. The judgment of the Court (Field, Manisty, and Bowen, JJ.) was delivered by

BOWEN, J. This is an application on the part of the Great Western Railway Company to stay the master from taxing costs under an order of the Railway Commissioners dated the 14th of February, 1877, in the matter of an application of Thomas Nelson Foster and Richard Gibbs Foster against the Great Western Railway Company, or, in the alternative, for a prohibition to prevent the Railway Commissioners or Messrs. Foster from proceeding further on the said order. By s. 17 of the Regulation of Railways Act, 1873, a railway company owning or having the management of a canal is bound to keep it in good working condition. The applicants, Messrs. Foster, had instituted proceedings against the railway company before the Railway Commissioners, on the ground that the Great Western Railway Company were in default, under this section, in respect of the Upper Avon river navigation. The Commissioners had dismissed the application on the ground that the Great Western Railway Company were not

(1) 4 Q. B. D. 611.
(2) 3 De G. & J. 329.
(3) 29 Beav. 77.
(4) 30 Beav. 550.

shewn to be either owners or managers of the navigation, but nevertheless ordered the railway company to pay one-half of Messrs. Foster's costs, for reasons which we shall presently mention. The railway company now complain that such an order inflicting an unsuccessful plaintiff's costs on a successful defendant is illegal and ultrà vires, and ask us to stay all further proceedings in respect thereof.

Under an Act of Parliament of 1846 it appears that the Stratford-on-Avon canal, with which the Avon river navigation communicates at Stratford, was the property of the Oxford, Worcester, and Wolverhampton Railway Company, whose whole undertaking has been vested, since August, 1863, in the Great Western Railway Company.

In the year 1857 Mr. Broughton, the then manager of the canal, either purchased or agreed to purchase the upper portion of the Avon river navigation, and the Railway Commissioners were of opinion that he acted in the matter in the interest of his employers, the Oxford, Worcester, and Wolverhampton Company; but whether the Upper Avon river navigation ever became vested legally in the Oxford, Worcester, and Wolverhampton Railway Company seems to be a disputed point. The management of the navigation, in the opinion of the Commissioners, from the early part of 1860, was exclusively in railway charge, first by the Oxford, Worcester, and Wolverhampton, next by the West Midland, and, since 1863, by the Great Western Railway Company.

Down to June, 1875, Mr. Hudson, acting as the railway company's agent, had collected the tolls, repaired the weir and lock gates, and managed the navigation for the railway company. But in June, 1875, it appearing that the cost of maintenance had for many years exceeded the tolls, the Great Western Railway Company resolved that they would no longer collect or receive tolls, and since then have abandoned the works and ceased to keep them repaired.

After hearing the evidence in the case the Commissioners were of opinion that the Great Western Railway Company had formerly been, but since 1875 had ceased to be, a company owning or managing the Upper Avon navigation, and that they were not

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bound to repair the same under s. 17 of the Act. Messrs. Foster's application accordingly failed. But the Commissioners, considering that the railway company were responsible for the uncertainty as to the ownership and liability to repair, which had occasioned the proceedings under the Act, directed that the railway company should pay half the costs of Messrs. Foster. The following passage in their judgment shews the principle on which this order was made:—

"Our opinion on the whole is, that at the date of the passing of the Act of 1873 they were a railway company having the management of the navigation, and were within the reach of the 17th section, but that that section does not at the present time apply to them. They had, it seems to us, power to surrender the management, and so relieve themselves of liability; and they did, we think, what had that effect by passing the resolution that the collection of tolls should be discontinued. But considering they had been managing since 1860, some public notice might well have been given that the railway company no longer claimed or possessed, and if that was their view, were by law unauthorized to possess any kind of interest, and as they are responsible for the uncertainty as to the ownership and liability to repair which has occasioned these proceedings, it will be reasonable that they should pay at least part of the costs of the application; the applicants accordingly are granted half their costs."

The order actually drawn up to carry out this direction is in some respects informal: but it was agreed on both sides, upon the argument before us, to treat the order as drafted so as to give effect to the judgment, if the judgment can legally be enforced, and that all necessary amendments to that extent should be deemed to be made. The railway company, however, insist that the Commissioners have exceeded their jurisdiction in ordering a successful defendant to pay any portion of an unsuccessful plaintiff's costs. A summons to stay proceedings on taxation, or in the alternative for a prohibition, was taken out on behalf of the company on the alleged ground that the order, so far as it related to costs, was ultrà vires. The learned judge at chambers referred the application to this Court.

Now it is no doubt contrary to the practice of the superior

Courts of this country to inflict on a defendant who has succeeded any portion of the costs of a plaintiff who has made out no title to relief. But the question before us is not whether in making such an order the Railway Commissioners have acted in conformity with the practice of the Courts administering law and equity; but whether in making such an order the Railway Commissioners have stepped outside their statutory powers.

Under the Railway and Canal Traffic Act of 1854, the Court of Common Pleas was entrusted with functions, similar in some respects to those which the legislature has since imposed on the Railway Commissioners, of dealing with complaints made against railway and canal companies in respect of anything done or any omission made in violation or contravention of that Act.

By s. 3 of the same statute it was, amongst other things, provided that in any such proceeding "the Court may order and determine that all or any costs thereof or therein incurred shall and may be paid by or to the one party or the other as such Court shall think fit." This wide power over costs has been transferred to the tribunal which succeeded to the functions of the Common Pleas. By the Regulation of Railways Act, 1873, the Railway Commissioners were created as a special tribunal, and clothed with exceptional powers to adjudicate on like complaints, and s. 28 of the Act of 1873 enacts as follows: "The costs of and incidental to any proceeding before the Commissioners shall be in the discretion of the Commissioners."

It appears to us that in establishing an extraordinary tribunal of the kind the legislature have in plain terms conferred upon them a wide discretion as to the manner in which they should deal with all questions of costs arising before them, and, provided that their decisions on such matters are bonâ fide, it is not for a court of law to examine the principle on which such decisions are based. That the Commissioners have in the present case exercised their discretion honestly on a matter upon which Parliament has made them the sole judges cannot be doubted; and, this fact once established, we are not entitled to inquire further, nor do we propose to criticise or offer any opinion on an order which it is not within our province to review.

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8 Q.B.D. Cas 366

The counsel for the company has indeed argued before us that a plaintiff's costs, when the plaintiff has been unsuccessful, are not costs which fall within the definition of costs of a proceeding before the Commissioners, a contention based on language used by the Master of the Rolls sitting in the Appeal Court in the case of *Dicks* v. *Yates* (1), a shorthand copy of the judgment in which has been furnished to us. In that case the Vice-Chancellor's decree in the Court below had contained no declaration that the plaintiff in the action was entitled to relief, but simply had directed the defendant to pay the plaintiff's costs. On an appeal being brought against the Vice-Chancellor's order the respondent's counsel (it would seem) took a preliminary objection, that the appeal was a mere appeal in respect of costs, and ought not to be entertained. The point so made was overruled by the Court of Appeal, which decided that it was a necessary inference from the form of an order ordering that the defendant should pay costs, that the plaintiff had succeeded in his title to relief, and that an appeal accordingly would lie. "Otherwise," according to the Master of the Rolls, "costs so given if the plaintiff had no title would not be costs by law in the discretion of the Court." But we think that it would be pressing this language of the Master of the Rolls far beyond its legitimate scope if it were interpreted to mean that a Court, established by Act of Parliament with absolute discretion over costs, was exceeding its statutory jurisdiction by making a similar order in favour of an unsuccessful plaintiff. His words must be read as having reference only to the control to be exercised by a Court of Appeal over a Court of first instance.

The Court of Appeal in *Dicks* v. *Yates* (1) was the proper tribunal to correct the discretion of the Court below, if founded on a wrong principle. We have no such authority as regards the Railway Commissioners, and having no such authority we abstain from discussing the question, which it is beyond our province to entertain, whether the order complained of is right or wrong upon the merits, or whether it does or does not diverge from the ordinary practice of Courts administering law and equity. Assuming the divergence to be established, it is not one with which we have power to interfere; it might or might not be a matter for

(1) 18 Ch. D. 76.

appeal if the legislature had given an appeal—it is not a matter for prohibition.

The application of the Great Western Railway Company must therefore be dismissed with costs.

Application dismissed.

Solicitor for company: *Nelson.*

Solicitors for applicants: *Crowder, Anstie, & Vizard.*

E. L.

MEEK *v.* CHAMBERLAIN AND WIFE. *Nov.* 29.

Dower—Release of, by Widow to Mortgagee—Reconveyance.

The owner in fee of certain lands died intestate, leaving a widow entitled to dower thereout. The heir-at-law executed a mortgage of the lands to secure a sum of money advanced to him by a building society. The widow was a party to the mortgage deed, by which, "for the purpose of extinguishing her right to dower," she granted and released the lands to the mortgagees, the trustees of the building society. It was provided by the deed that, upon repayment of the moneys secured thereby, a receipt should be endorsed thereon in the form given by 6 & 7 Wm. 4, c. 32, to the intent that the deed should be vacated and the property comprised therein be revested in the person or persons for the time being interested in the equity of redemption therein. The moneys secured by the deed having been repaid, and the statutory receipt indorsed thereon:—

Held, that the widow was, notwithstanding the release of her dower contained in the mortgage deed, entitled to have dower assigned to her out of the premises comprised in the deed.

Dawson v. *Bank of Whitehaven* (6 Ch. D. 218) distinguished.

APPEAL from the County Court of Gloucestershire.

This was an action which had been remitted to the county court for trial.

The claim was for the recovery of a house and land. The defendants counterclaimed, in right of the female defendant, that dower of the lands, of which one Enoch Meek, the late husband of the female defendant, died seised, should be assigned to her.

At the trial in the county court it appeared that the plaintiff was the heir-at-law of Enoch Meek who had died intestate, seised in fee of the premises in question. After Enoch Meek's death his widow, the female defendant, had joined with her son, the heir-at-law, in executing a mortgage of the premises in order to

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secure money advanced by a benefit building society to the heir-at-law, for the purpose of certain repairs and improvements to be effected on the premises. By the mortgage deed it was witnessed that Thomas Meek, the heir-at-law, did grant and convey, and the female defendant, for the purpose of extinguishing her right or title to dower in the said hereditaments at the request of the said Thomas Meek, did grant and release unto the trustees of the building society, their heirs and assigns, the hereditaments in question, to hold the same discharged from all right or title to dower of the female defendant, but subject to the proviso for redemption thereinafter contained. The proviso for redemption provided that upon satisfaction of the moneys secured by the mortgage the trustees of the society should, pursuant to the provisions of 6 & 7 Wm. 4, c. 32, indorse upon the deed a receipt for all money thereby secured in the form set forth in the schedule to the said Act, to the intent that the said deed might be vacated and the property comprised therein be vested in the person or persons for the time being entitled to the equity of redemption therein. All the moneys secured by the said deed had been paid off, and the requisite receipt for such moneys indorsed upon the deed.

The county court judge held that the female defendant's right to dower was extinguished by the mortgage deed, and gave judgment for the plaintiff on the claim and counterclaim.

A rule nisi had been obtained for a new trial, on the ground that the judge was wrong in holding that the female defendant's right to dower was extinguished by the execution of the mortgage deed.

A. T. Lawrence, shewed cause. The female defendant's right to dower was extinguished by the release of her dower contained in the mortgage deed. By that deed the dower was released, and the legal estate in the premises was vested, free from dower, in the mortgagees. The widow could have no right to dower out of the estate after the execution of the deed, for by the deed the estate of the heir-at-law was turned to an equity of redemption, and equity does not recognise the right to dower. It is well settled that there is no right to dower out of a merely equitable

estate, except under 3 & 4 Wm. 4, c. 105, s. 2, which only applies where the husband dies possessed of an equitable estate, which was not the case here. The right to dower could not revive on the revesting of the legal estate in the heir-at-law. The indorsement of the receipt operated as a reconveyance to the heir-at-law of the legal estate, free from dower, the right to dower being extinguished and there being nothing to revive it, inasmuch as there was no term in the deed that it should revive.

[He cited *Dawson* v. *Bank of Whitehaven* (1); *Altham's Case.* (2)]

Anstie, supported the rule. The case of *Dawson* v. *Bank of Whitehaven* (3) has no bearing on the present. In that case the mortgage was before the husband's death, and the estate of the husband before his death had become an equitable one, and therefore, according to the well-settled law on the subject, there was no right to dower out of it. In the present case the husband died seised at law, and consequently, the right to dower having accrued, the only question is as to the effect of the mortgage deed and subsequent reconveyance. It is the general principle of equity that a mortgage is only regarded as a security for a debt and not as really affecting the estate of the mortgagor, or the title thereto, further than may be necessary for the purpose of securing the debt. Consequently, upon the satisfaction of the debt and reconveyance of the land, the title to the land and the interest of the widow therein remain unaffected. The release of the dower contained in the deed must be construed having regard to this principle, and as only intended to give a good title to the mortgagees for the purposes of their security, not as intended to release the dower as between the widow and the heir-at-law.

[He cited *Jackson* v. *Innes* (4); *Jackson* v. *Parker* (5); *Chaplin* v. *Chaplin* (6); *Banks* v. *Sutton* (7); *Lord Hamilton* v. *Mohun* (8); *Pearce* v. *Morris* (9); *Whitebread* v. *Smith* (10).]

GROVE, J. The only difficulty I felt during the argument arose from the case of *Dawson* v. *Bank of Whitehaven* (3), but I think

(1) 6 Ch. D. 218.
(2) 4 Rep. 440.
(3) 6 Ch. D. 218.
(4) 1 Bli. 104.
(5) Amb. 687.
(6) 3 P. Wms. 229.
(7) 2 P. Wms 700.
(8) 1 P. Wms. 118.
(9) Law Rep. 5 Ch. 227.
(10) 1 Dr. 531.

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that that case is clearly distinguishable on the ground suggested by the defendants' counsel. There the husband, at the time of his death, had no legal estate at all but only an equitable fee. Here the husband died seised of the legal fee to which the right of dower would attach. The whole question, therefore, is whether the wife is prevented by the mortgage deed from claiming a right to dower. It seems to me that she is not, on the broad doctrine of equity referred to in *Banks* v. *Sutton* (1), viz., that a mortgage is to be looked upon as a personal contract, and the mortgagee has no interest beyond his money.

There is nothing in this mortgage deed to take the case out of that general rule. It seems to me that the widow only extinguished her dower in order to give a good title to the mortgagees for the purposes of their security, and that upon the reconveyance things were restored to the condition in which they were before the mortgage was executed. For these reasons I think the rule must be absolute.

LOPES, J. I am of the same opinion. It is not the case that the Court of Chancery does not give effect to the widow's right to dower. It is true that equity did not before the Dower Act acknowledge the right to dower out of a merely equitable estate. That is the explanation of the case of *Dawson* v. *Bank of Whitehaven.* (2) In that case the husband died seised of an equitable estate only. Here the husband died seised of a legal estate, and that legal estate is now vested in the heir-at-law. It is argued that the mortgage deed extinguished the right to dower. Whether this is so or not seems to depend on the construction of the release of dower therein contained. Is the true construction that the wife released her dower for all purposes or only for the purposes of the security given to the mortgagees? I am of opinion that the latter is the true construction, and that the effect of the release was at an end when the reconveyance took place.

Rule absolute.

Solicitors for plaintiff: *Hughes & Beadles, for J. Robinson.*

Solicitors for defendants: *Wilkins, Blythe, & Fanshawe, for Carter.*

(1) 2 P. Wms. 700, 716.

(2) 6 Ch. D. 218.

E. L.

MILLEN *v.* BRASH & CO. 1881 *Nov.* 26.

Carrier—Negligence—Carriers Act (11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68), *s.* 1—*Temporary Loss of Goods—Damages—Remoteness.*

A carrier is not de prived of the protection afforded by the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), s. 1, by the fact that the loss of the goods is temporary and not permanent.

The plaintiff delivered to the defendants, who were carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence shipped by steamer for Italy. Owing to the defendants' negligence the trunk was sent to the Victoria Docks and put on board another vessel bound for New York where it arrived, and a long time elapsed before it was restored to the plaintiff. The trunk contained articles within the Carriers Act, the value of which exceeded 10*l.* :—

Held, by Lopes, J., having power to decide questions of law and fact, first, that the defendants were not deprived of the protection of the Carriers Act by the fact that the loss of the goods was temporary and not permanent; secondly, that the loss of the trunk must be taken to have occurred during its transit by land, as it was lost to the plaintiff directly it went on its wrong road to the Victoria Docks; thirdly, that the plaintiff was entitled, notwithstanding the Carriers Act, to recover as damages the cost of the re-purchase of other articles at Rome at enhanced prices in place of those temporarily lost, as this was not damage for the loss, but for something consequential to it, and the damage was not too remote, for it was a reasonable and necessary act for a person in the position of the plaintiff to buy these articles in Rome.

Reversed on appeal 18 Q.B.D. 142 C.A.

ACTION by the plaintiff, against the defendants as carriers, for unreasonable delay in the delivery of a trunk belonging to the plaintiff, and injury to its contents while in the defendants' custody.

At the trial, before Lopes, J., the jury were discharged, and all questions of law and fact left to the learned judge.

E. Pollock, for the plaintiff.

Bigham, for the defendants.

The facts and arguments sufficiently appear in the judgment.

Cur. adv. vult.

Nov. 26. LOPES, J. This case raises an important question under the Carriers Act. The defendants are carriers for hire from London to Rome. On the 13th of November the plaintiff's agent delivered to the defendants a trunk to be sent by rail from London

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to Liverpool, and there shipped in one of Bibbey's steamers for Italy. The defendants had in their possession a case of paper goods (Christmas cards) consigned to Mr. Hamburger, of New York. By the carelessness of the defendants' servants the trunk belonging to the plaintiff was taken to the Victoria Docks and shipped as and for Hamburger's case to New York. The defendants were not aware of the mistake until about the 15th of December, 1879. On the 15th of December the defendants wrote to Hamburger, and on the 19th of December the trunk arrived in New York. On the 27th of February, 1881, the plaintiff claimed 210*l.* for loss of the trunk, and injury to its contents.

On the 11th of March the trunk arrived at the defendants' offices, and, at the plaintiff's request, was retained there till June, and then delivered to the plaintiff. The miscarriage of the trunk and its loss for the time was admitted. It was also admitted that some of the contents of the trunk were injured in New York, owing to the Custom House officers unpacking the trunk, and negligently and unskilfully repacking it. It was also admitted that the silk dresses and sealskin jacket are articles within the Carriers Act, that their value exceeded 10*l.*, and that no declaration was made. If the plaintiff is entitled to a verdict it is agreed that the damages are: for silk dresses, 36*l.*; for sealskin jacket, 4*l.*; and for repurchase of other articles in Rome at enhanced prices, 10*l.*; and that these several sums should be beyond the 5*l.* paid into court. The jury were discharged by consent, and all questions of law and fact were left to me.

The plaintiff complains of unreasonable delay in the delivery of the trunk, and injury to its contents while in the defendants' custody. The defence rests upon the Carriers Act, and unless the defendants bring themselves within the provisions of that Act the plaintiff is entitled to recover. The plaintiff contends that the Carriers Act does not apply in this case, because the loss was temporary and not permanent. There is nothing in the Carriers Act, and no authority, which would justify so narrow a construction to be put upon the word "loss." I think it immaterial whether the loss is temporary or absolute. The trunk and its contents not being delivered within a reasonable time were lost to the owner within the meaning of the Act.

The plaintiff also contended that the Carriers Act did not apply, because the defendants were not carriers of the trunk by land. The trunk was accepted to be carried partly by land and partly by sea. *Le Couteur* v. *London and South Western Ry. Co.* (1) is an authority to shew that, when there is one entire contract to carry partly by land and partly by sea, the contract is divisible, and that as to the land journey the carrier is within the protection of the Act if the loss arise during the transit by land. I think this trunk was lost in its transit from the defendants' receiving-house. It ought to have gone to the railway to be conveyed to Liverpool; it went to the Victoria Docks; directly it was on its wrong road it was lost to the owner within the meaning of the Carriers Act.

Again, it was contended by the plaintiff that the defendants were not entitled to the protection of the Carriers Act, because they were wrongdoers; wrongdoers in that they sent the trunk on the wrong road and not on the journey contracted for: *Morritt* v. *North Eastern Ry. Co.* (2) is an answer to this objection. Blackburn, J., there says, "Unless it is proved that the misdelivery was intentional the case is within the Act." In that case pictures had been sent beyond their destination. Mellish, L.J., also says in the Appeal Court, "If goods by the negligence of the carrier are carried beyond the point of destination and injured this is within the Carriers Act." I can see no distinction in principle between that case and the present. This objection therefore fails.

It was lastly contended by the plaintiff that he was entitled to recover the 10*l.* for repurchase of other articles in Rome at enhanced prices, irrespective of the Carriers Act, and that the Carriers Act did not apply to that portion of his claim. I think the plaintiff is right, for this is not a loss by the carrier of the trunk nor an injury to its contents, but damages sustained by the owner in consequence of the non-delivery within due time, it is something consequential to its loss. I do not think this 10*l.* is within the protection of the Carriers Act. But the defendants say if it is not within the protection of the Carriers Act this portion of the claim is too remote. Much depends on whether it was a reasonable and necessary act of the plaintiff to buy these

(1) Law Rep. 1 Q. B. 54. (2) 1 Q. B. D. 302.

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articles in Rome. This is a question of fact which I have to decide. I think it was both the reasonable and necessary consequence of the defendants' failure to deliver that the plaintiff should purchase what he did in Rome—a necessity arising from the non-delivery of a trunk which the defendants might fairly assume contained wearing apparel.

The observations of Mellish, L.J., in the case of *Le Blanche* v. *London and North Western Ry. Co.* (1), are not inapplicable here. That was a case where a passenger, delayed in his journey by the want of punctuality in the arrival of the defendants' train, sought to recover the costs of a special train which he had engaged. Mellish, L.J., said, "Now one mode of determining what under the circumstances was reasonable is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company." I think the plaintiff would have gone to the same expense and bought the same articles for the use of his wife if there had been no railway company to look to, and if the trunk had been lost by his own fault. There was nothing extravagant or unreasonable in his so doing. I do not think these damages too remote. I give judgment for the plaintiff for 5*l.* beyond the 5*l.* paid into court with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Wilson, Bristows, & Carpmael.*
Solicitors for defendants: *Goldberg & Langdon.*

(1) 1 C. P. D. 286.

A. P. S.

SIMCOX, APPELLANT; THE LOCAL BOARD FOR HANDSWORTH, STAFFORD, RESPONDENTS. 1881 *Nov. 8.*

Local Government Acts (38 & 39 *Vict. c.* 55). *ss.* 150, 257—*Notice to several Owners to Sewer, Pave, &c.—Default by One only—Right to execute Works without giving fresh Notice—Apportionment, when conclusive—Summary Proceedings—Delay between Complaint and Summons.*

The appellant and five others were the owners of premises within the district of the respondents, an urban authority under the Public Health Act, 1875. These premises abutted upon a street (not being a highway), which street was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the respondents. The respondents gave a separate notice to each of such owners requiring them to sewer, level, pave, flag, and channel the parts of the street in front of their premises, within a specified time. Five of the owners executed the works in front of their premises, but the appellant made default. The respondents thereupon executed the works required to be done in front of her premises, and their surveyor having made his apportionment, gave her a notice stating that the expenses had been apportioned by their surveyor, who had settled that 213*l.* 13*s.* 6*d.* was payable by her according to the frontage of her premises, and that they required payment of that sum:—

Held, first, that the respondents were not bound before executing such works to give the appellant a fresh notice specifying the particular works which remained to be done by her; secondly, that the respondent not having given notice to dispute the apportionment, it became binding on her within the three months limited by s. 257, and that summary proceedings might be taken under that section for the recovery of the amount due from her; thirdly, that in such summary proceedings it was no objection to the validity of a summons that it was issued more than a year after the complaint upon which it was founded; fourthly, that the notice of apportionment, which concluded with a demand of payment of the amount apportioned, was not a "notice of demand" within s. 257, and that the six months within which, under s. 252, summary proceedings must be taken, were not to be reckoned from it but from a subsequent notice of demand.

CASE stated by justices for Stafford under 20 & 21 Vict. c. 43.

The justices made an order on the appellant to pay 213*l.* 13*s.* 6*d.* as the proportion of expenses for paving, &c., payable by her according to the frontage of her premises under the Public Health Act, 1875. (1)

(1) 38 & 39 Vict. c. 55, s. 150: Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the footway, or any other part of such street is not sewered, levelled, paved, metalled, &c., to the satisfaction of the urban authority, such authority may by notice addressed to the respective owners or occupiers of the premises fronting or abutting on such parts thereof as may require to be sewered,

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The appellant is the owner of premises within the district of the respondents abutting upon a street called Albert Road (not being a highway), and which street was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the respondents. On the 25th of June, 1878, the respondents, in pursuance of the Public Health Act, 1875, gave notice to the appellant, as owner of property fronting such street, reciting that her premises abutted on certain parts of the said street which required to be sewered, levelled, paved, flagged, and channelled, and requiring her to sewer, level, pave, flag, and channel the same within a specified time. Similar notices were served on five other owners of property

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levelled, &c, require them to sewer, level, &c., the same within a time to be specified in such notice.

Before giving such notice the urban authority shall cause plans and sections of any structural works intended to be executed under this section, and an estimate of the probable cost thereof, to be made under the direction of their surveyor. Such plans, &c., shall be deposited in the office of the urban authority, and shall be open at all reasonable hours for the inspection of all persons interested therein.

If such notice is not complied with the urban authority may, if they think fit, execute the works mentioned or referred to therein, and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration, in manner provided by this Act, or the urban authority may, by order, declare the expenses so incurred to be private improvement expenses.

Sect. 252. Any complaint or information made or laid in pursuance of this Act shall he made or laid within six months from the time when the matter of such complaint or information respectively arose.

Sect. 257. Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest not exceeding 5*l.* per cent. from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed, for which such expenses have been incurred. In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand. Where such expenses have been settled and apportioned by the surveyor of the local anthority as payable by such owner, such apportionment shall be binding and conclusive on such owner unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same.

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in the said street. The five owners executed the work required by the notices to be done by them, but the appellant did not comply with the notice so far as it applied to her. The respondents thereupon executed the works, and their surveyor apportioned the expense incurred by them and payable by her according to the frontage of her premises at 213*l.* 13*s.* 6*d.*; the whole of such expenses being incurred in the execution of works in front of her premises. On the 6th of June, 1879, the respondents served upon the appellant a notice stating that their surveyor had settled that £213 13*s.* 6*d.* was due from her in respect of her premises, and that they thereby required payment of the amount.

The appellant did not dispute the apportionment of the surveyor within the time specified by s. 257 of the Public Health Act, 1875.

On the 15th of October, 1879, a notice of demand signed by the clerk of the respondents was served upon the appellant, demanding payment of the 213*l.* 13*s.* 6*d.*, and the appellant not having paid the amount the respondents on the 13th of March, 1880, preferred a complaint before the justices for the recovery of that sum. A summons was issued upon such complaint on the 11th of April, 1881, calling on the appellant to shew cause why she should not pay the amount.

Upon the hearing the justices made an order for the payment of the amount, and they submitted the questions:

(1.) Whether the summons was improperly issued on the 11th of April, 1881?

(2.) Whether s. 257 of the Public Health Act, 1875, applied to the recovery of the expenses?

(3.) Whether the notice dated the 6th of June, 1879, was a good notice of apportionment?

(4.) Whether the demand therein contained was a legal demand?

(5.) Whether the respondents were entitled to give the notice of demand under s. 257? and whether it was a demand properly made?

(6.) Whether the appellant was entitled to dispute the apportionment at the hearing of the summons?

Anstie, for the appellant. First, the summons was issued an

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unreasonable time after the date of the complaint, and ought on that account to have been dismissed, though it may be admitted that there is no express authority to warrant this proposition. Secondly, conceding that in summary proceedings under s. 257 the period of limitation is prolonged to nine months from the date of the offence, there is nothing to shew that this section applies to proceedings according to s. 150. Thirdly, s. 150 contemplates that where there are more owners than one the works should be done jointly and as a whole by the adjoining owners, and where one owner does not perform his share of the work a fresh proceeding on the part of the local authority is necessary, and they must give a fresh notice specifying the work which remains to be done. The original notice is for the whole work and not for the particular part which is left undone. The words "execute the works" are not distributed. The local authority are only authorized to execute the works mentioned in the notice, i.e., the whole of the works. Fourthly, the period of limitation ran from the notice of apportionment, which required payment of the amount apportioned, and was a "notice of demand" within s. 257. The fact that it required payment of a debt which was not immediately payable did not make it the less a demand.

Jelf, Q.C. (*Bosanquet*, with him), for the respondents. First, the delay in issuing the summons (which was owing to negotiations between the parties) is immaterial: *Reg.* v. *Barret* (1) where a conviction made a year after the day of the information was held to be sufficient.

[THE COURT intimated that the delay did not affect the validity of the summons.]

Thirdly, the respondents were not bound to give the appellant a fresh notice before they proceeded to execute the works. Sect. 150 empowers the urban authority to serve notice on the adjoining owners to execute the works and afterwards to recover the expenses from the "owners in default," without in any waw referring to a fresh notice. It cannot be supposed that, in a case where part of the owners have done their share of the work, the local authority are to be at liberty to destroy it in order that they themselves may execute the whole and recover the expenses.

(1) 1 Salk. 383.

GROVE, J. I think that our judgment ought to be for the respondents. The objection to the validity of the summons because of the delay in issuing it is clearly untenable. And there is no ground for contending that the proceedings are out of time, for the fact that the notice of the amount apportioned on the appellant also requested payment of the amount did not, according to *Grece* v. *Hunt* (1), make it a notice of demand under s. 257. This notice of demand is made three months after service of the notice of apportionment, and an unnecessary demand before this period has elapsed is immaterial.

As for the question whether a fresh notice to the appellant was necessary before completing the works, I am far from saying that it is free from difficulty, but I think the only way of fairly construing the section is to hold the words, "owners in default," to mean those owners who have not performed their share of the requisite works. It may be that when the works have been executed each owner is bound to contribute to the whole cost according to the frontage of his premises, but it is not meant that each owner may be called upon to execute the whole. The work to be done by one owner may prove to be much greater than that which devolves upon the others, but this inequality will be corrected by the surveyor when he makes his apportionment. To require a fresh notice to execute works to be given to each owner in default would be an intolerable hardship.

BOWEN, J., concurred.

Judgment for the respondents.

Solicitor for appellant: *F. Needham.*
Solicitors for respondents: *Robinson, Preston, & Stow.*

(1) 2 Q. B. D. 389.

A. P. S.

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Nov. 17.

GORDON *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway Company — Reduced Rate — Conditions — "Detention" — Wrongful Refusal to Deliver at end of transit—Mistake as to whether Carriage was Paid.

The plaintiff delivered cattle, carriage prepaid, to the defendant railway company for carriage on the terms of signed conditions whereby, in consideration of an alternative reduced rate, it was agreed that the company were "not to be liable in respect of any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except upon proof that such loss, detention, or injury, arose from the wilful misconduct of the company or its servants."

The cattle were carried; but, on application made for them by the plaintiff, the defendants, in consequence of their clerk having negligently omitted to enter the cattle on the consignment note as "carriage paid," refused to deliver them, and alleged that the carriage was not paid. The cattle were kept exposed to the weather until the next day, when the mistake having then been ascertained, they were delivered. They were damaged by the exposure. In an action for damages by reason of wrongful detention and negligence:—

Held, that the withholding of the cattle, under a groundless claim to retain them, at the end of the transit was not "detention" within the conditions, and the company were therefore liable.

Case stated on appeal from the Gloucester county court.

The action was for damages by reason of the illegal and wrongful detention, and negligence by the defendants at Gloucester station, of and to certain cattle the property of the plaintiff.

At the trial it appeared that on the afternoon of the 6th of April, 1881, the plaintiff delivered to the defendants at Waterford station, ten cattle to be carried to Gloucester, and there delivered to the plaintiff's agent or his order. The cattle were consigned, and the carriage was prepaid by the plaintiff at what is known as the "Owner's risk rate," and the plaintiff signed a consignment note. On the face of the note was a notice that the company "have two rates for the conveyance of cattle; one the ordinary rate or toll, when they take the ordinary liability of the carrier; the other a reduced rate, adopted when the sender relieves them of all liability of loss, damage, or delay, except upon proof that such loss, damage, or delay arose from wilful misconduct on the part of the company's servants." Then followed an undertaking signed by the sender of the cattle whereby in consideration of the carriage at

the reduced rate he undertook to relieve the company "from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of the company's servants," and he also agreed to the "conditions and regulations on the back of this note." The first of those conditions was, "That the company are not to be liable in respect of any loss or detention of, or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except upon proof that such loss, detention, or injury arose from the wilful misconduct of the company or its servants."

In the ordinary and usual course of business, cattle under the above circumstances would be delivered at Gloucester station after their arrival directly the consignee applied for them.

The cattle arrived at Gloucester late in the evening of the 7th of April, and were unloaded by the defendants' servants and placed in cattle pens. On the following morning a drover in the employment of the consignee duly applied for the cattle, but in consequence of the defendants' servants at Waterford, who received the amount paid by the plaintiff for carriage, having negligently omitted to enter the cattle on the consignment note as "carriage paid," the defendants' servants refused to deliver the cattle, alleging that the carriage was not paid.

During the time the cattle were detained at Gloucester station they were exposed to the inclemency of the weather and damaged to the amount of 35*l.*

On the 9th of April the plaintiff demanded the cattle. The defendants' manager then said there had been a mistake by reason of the negligence of the defendant company's clerk at Waterford about the carriage, but that the plaintiff could have the cattle, and they were accordingly handed over to him at Gloucester station.

At the conclusion of the plaintiff's case, the counsel for the defendants submitted that, having regard to the terms of the consignment note, the plaintiff should be nonsuited.

The judge declined to nonsuit, and the defendants' counsel calling no witnesses, judgment was given for the plaintiff for 35*l.*; on the ground, that although no wilful misconduct on the part of the defendants' servants was proved, their conduct amounted to a

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refusal to deliver which was not covered by the terms of the consignment note.

The question for the opinion of the Court was, whether, upon the facts, the judgment was erroneous in point of law.

Page, for the defendants. First, the cattle were carried on the terms of the consignment note, which was duly signed. The plaintiff is therefore bound by the conditions. They are in consideration of an alternative reduced rate, and are fair and reasonable: *Peek* v. *North Staffordshire Ry. Co.* (1); *Lewis* v. *Great Western Ry. Co.* (2); *Haynes* v. *Great Western Ry. Co.* (3); *Ashenden* v. *London Brighton and South Coast Ry. Co.* (4) In *Lewis* v. *Great Western Ry. Co.* (2), Bramwell, L.J., suggested that even without the exception of wilful misconduct the conditions would be good, as there is an alternative rate. The delay in delivering the beasts was "detention" within the terms of the conditions, and the railway company are therefore not liable. The most common cause of such delay is a dispute about charges, as in the present case. The conditions would certainly have covered detention pending a dispute whether 6*l.* or 7*l.* was due for carriage. The word "detain" includes any kind of detention, for it means "to keep that which belongs to another:" Johnson's Dictionary. This form of consignment note has been held to apply to a case where the transit was ended and there was misdelivery of the goods: *Hoare* v. *Great Western Ry. Co.* (5) The "detention" was "in delivering" the beasts. The 7th section of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), under which the conditions are made, is not confined to transit only: *Hodgman* v. *West Midland Ry. Co.* (6) The words "receiving, forwarding, and delivering" in that section are used in this consignment note. If the plaintiff contends that although he might not be able to sue on contract he may sue in tort, the answer is found in *Morritt* v. *North Eastern Ry. Co.* (7), where the Court of Appeal decided that a carrier is not deprived of the protection of the

(1) 10 H. L. C. 473.
(2) 3 Q. B. D. 195.
(3) 41 L. T. (N.S.) 436.
(4) 5 Ex. D. 190.
(5) 25 W. R. 631.
(6) 6 B. & S. 560; 33 L. J. (N.S.) Q. B. 233.
(7) 1 Q. B. D. 302.

Carriers Act (11 Geo. 4, and 1 Wm. 4, c. 68, s. 1) by the fact that the loss of or injury to the goods happens after they have been negligently taken by him beyond their point of destination. The conditions here would cover misdelivery, à fortiori, a mere temporary detention. Secondly, the detention was caused by a mistake, and no "wilful misconduct." The misconduct, if any, was in the clerk at Waterford, the wilfulness, if any, in withholding delivery at Gloucester. But the two acts cannot be so combined as to be "wilful misconduct" within the meaning of the exception. There is no evidence of it: *Haynes* v. *Great Western Ry. Co.* (1)

Jelf, Q.C., for the plaintiff. The conditions do not apply to this case. If they do they are unreasonable. It may even be admitted that conditions such as these, when they do apply, may extend to something beyond the transit of the goods. But in *Hoare* v. *Great Western Ry. Co.* (2), that point was given up, there being evidence of wilful misconduct. Moreover the word "detention" did not occur there. The authorities do not govern this case, which is simply that of a company setting up an unfounded claim of lien, and then seeking the protection of a note having in it the word "detention" which they would construe so as to cover every kind of withholding. Misdelivery by mistake, and refusal to deliver under a wrongful claim, are totally different. Misdelivery is a not uncommon incident of carriage which well may happen, and be anticipated by conditions. But the parties cannot be said to have contemplated and stipulated against liability for such an act as the blunder of a clerk, followed by an unjustifiable withholding of goods after they arrived safely at their destination. [He was stopped.]

GROVE, J. I put out of the question for a moment the words "wilful misconduct" used in the consignment note, because although mere honest forgetfulness such as that of the clerk at Waterford, if he had simply forgotten to write "carriage paid" on the note, might not be "wilful misconduct," yet I am not prepared to say that there was no "wilful misconduct" in the company refusing to deliver the cattle. That would be a different

(1) 41 L. T. (N.S.) 436. (2) 37 L. T. (N.S.) 186: 25 W. R. 631.

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question. But I rest my decision at present on the words used in the condition, and do not think that, if fairly and reasonably read, the case comes within it. The condition is that the company are not to be liable in respect of any loss or detention of, or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except upon proof that such loss, detention, or injury arose from the wilful misconduct of the company, or its servants. Does the word "detention" there apply—not merely to some stoppage in transit, or mistake by which the cattle truck had been sent into a wrong siding or delivered in course of transit to the wrong person, or any such mistake causing delay, but—to the withholding of the cattle by the company under claim of a supposed right on which they insisted? I think that is not "detention" within the meaning of the condition, or that anybody would naturally suppose that it was so. It was not any "detention," which had delayed or prevented their arrival. The word "detention" alone may, no doubt, apply to an absolute refusal to deliver grounded on some cause which is supposed to give a right to refuse delivery. But I think that the word "detention" as used in this condition does not mean any detention by absolute refusal, but by something that prevents the company from delivering the cattle at the proper time. The learned counsel who argued for the defendants candidly, fairly, and well, did not stop short of saying that, under the conditions, the company would not be liable for any loss however occasioned, for any withholding though wilful and determined, for any injury, though by reckless and intentional acts of the company's servants. I think that would be an extravagant meaning to put on this clause; with such a meaning the condition would be unreasonable. It is suggested that Bramwell, L.J., has said that where there are alternative charges it might be reasonable. But I do not think that he could then have had in his mind such a meaning as is now sought to be put on the word "detention" in this case, viz., withholding under a groundless claim to retain the chattels after they have arrived at their destination, and are ready for delivery. I do not think that is detention "in the receiving, forwarding, or delivery." It was not in the course of delivery, but an absolute

refusal to deliver at the end of the transit, the beasts having arrived and being ready for delivery, and the company having, perhaps, nothing more to do than to let the consignee take them. I do not think that such a ground for withholding goods as that alleged, is imported in the meaning of the condition. It is the first time this point has been decided. Perhaps it might be said that it is the first time a railway company have had the courage to raise it. As to the cases cited, they may be distinguished. I was a little embarrassed by the case of misdelivery. But I think there is a distinction. If the servants of the company took the goods to the wrong person either in the transit or at the end of it, that, I think, might be "detention" or "delay" within the meaning of the condition. But this is no such case.

LOPES, J. I am of the same opinion. What was the act of the defendants? It was not an act which could be called a misdelivery of the cattle. It was not an act committed by sending the cattle along the wrong line, or into the wrong siding. It was an unjustifiable refusal by the defendants to deliver the cattle at the proper time. Can that possibly be a "detention in the delivery" within the meaning of the condition? [The learned judge read it.] I quite admit that misdelivery or delay in transit would come within the condition, but I think that what happened in this case was altogether dehors that clause. It is unnecessary to decide the question as to misconduct; if we had to do so, I think we should be bound to take into consideration not only what happened at Waterford, but the conduct of the company when the cattle reached Gloucester. Although on the application for them, it would have been easy at once to ascertain by telegraph that the carriage was in fact paid, the company do not seem to have done so, and the cattle were obstinately withheld during at least a day and a night.

Judgment affirmed.

Solicitor for plaintiff: *J. M. Weightman.*
Solicitor for defendants: *R. R. Nelson.*

J. R.

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Nov. 22.

THE QUEEN ON THE PROSECUTION OF THE GUARDIANS OF THE PRESTWICH POOR LAW UNION, RESPONDENTS; *v.* THE OVERSEERS OF THE TOWNSHIP OF MANCHESTER, APPELLANTS.

Poor Law—Order of Removal—Status of Irremoveability—Effect of Break of Residence of Husband on status of Wife—9 & 10 *Vict. c.* 66, *s.* 1—11 & 12 *Vict. c.* 111, *s.* 1.

A husband who had acquired a status of irremoveability in the P. union went to America in January, 1880, intending to reside there, leaving his wife and children resident in that union; there was no evidence of desertion. In March, 1880, he died in America; in May of the same year the wife and children became chargeable to the union. In April, 1881, an order was made by justices removing the wife and children to Manchester, the husband's last place of settlement:—

Held, that the break of residence by the husband was, in law, a break in the wife's residence, and that the order of removal was good.

ON appeal to the Salford Sessions against an order of removal, the sessions confirmed the order, subject to the following case:—

The pauper Jessie Parkinson was the widow of Noble Parkinson, and had four children. Noble Parkinson, whose last place of settlement was admitted to be Manchester, left that place on the 19th of March, 1878, when he went with his wife and family to reside at Bradford, in the Prestwich Poor Law Union. He continued to reside there with his wife and family until the 22nd of January, 1880, and it was admitted that, if he had then become chargeable, he, his wife and children, would have been irremoveable from the Prestwich Poor Law Union. On that day Noble Parkinson left his wife and children at Bradford, and went to America in search of work, and intending to reside in America. There was no evidence whether he intended to fetch or send for his wife and children to America. He died at New York on the 13th of March, 1880, and on the 3rd of May, 1880, Jessie Parkinson and her children became chargeable to the Prestwich Poor Law Union, and continued so till the 14th of April, 1881, on which day the order of justices was made removing her and her four children from the Prestwich Poor Law Union to Manchester.

On the 6th of October, 1881, a rule was obtained calling on the respondents to shew cause why the order of justices and the order of sessions confirming the same should not be quashed, on the

ground of their insufficiency. It was admitted, during the argument, that if the mother was removeable the children were removeable also.

Leresche, for the respondents, shewed cause. The departure of Parkinson, sine animo revertendi, made a break in his residence in the Prestwich Union, and the pauper has acquired no status of irremoveability, either as widow or as deserted wife. The wife could acquire, proprio jure, no right of irremoveability during her husband's life, unless she came within the provisions relating to a deserted wife. By 24 & 25 Vict. c. 55, s. 3, a status of irremoveability is conferred on a deserted wife, who has, after her desertion, resided for three years in such a manner as would, if she were a widow, render her exempt from removal, and this period is reduced to twelve months by 29 & 30 Vict. c. 113, s. 17; but in the present case she had not been deserted for twelve months, nor do the two periods of residence as deserted wife and as widow together make up the required year. Before her husband's desertion she had not acquired an independent condition of irremoveability; if he moved his place of residence, she would in law follow him, although physically she might remain in the same place: *Reg.* v. *Llanelly* (1); *Reg.* v. *Manchester* (2); *Reg.* v. *East Stonehouse.* (3)

[LOPES, J. May not the period of residence as wife be added to that during widowhood, so as to render a widow irremoveable?]

Yes: *Reg.* v. *Glossop* (4); but there the husband had resided for five years, and died in the parish without any break of residence; he died seised, as it were, of a status of irremoveability. In *Reg.* v. *Elvet* (5) the father, after acquiring by residence a status of irremoveability, received relief in consequence of the maintenance of his wife as a pauper lunatic. His child had not acquired by residence a status of irremoveability at the time of the first receipt of relief; and it was contended that residence after that date could not be reckoned in favour of the child; but

(1) 17 Q. B. 40; 20 L. J. (M.C.) 179.
(2) 17 Q. B. 46.
(3) 4 E. & B. 901; 24 L. J. (M.C.) 121.
(4) 12 Q. B. 117; 17 L. J. (M.C.) 171.
(5) 2 E. & E. 267; 29 L. J. (M.C.) 17.

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the Court held that the child acquired a status of irremoveability by residence with her father, and that she was therefore irremoveable. Here there is a ceasing to reside on the 22nd of January on the part of the husband, and the wife's condition as to irremoveability is governed by his.

[He also cited *Reg.* v. *St. Marylebone* (1); *Wellington* v. *Whitchurch.* (2)]

Smyly, for the appellants. There is no break of residence found in the case; the mere fact of his living in America would be no break, if he were intending to send for his wife and family, and were in the meantime supporting them. It is an inference from the facts, though not found in the case, that he had either left money with his wife or had sent it to her; and until a break of residence by his not continuing to live in the same house by himself, or by his wife and children supported by him, his status, and therefore that of his wife, would not be destroyed.

But assuming a desertion or break of residence by the husband, then after his death the residence of the wife must be looked at apart from that of the husband. In *Reg.* v. *Elvet* (3), during the interval between the death of the father and that of the mother, who had actually been removed, the status of the child followed that of her mother; yet she was held irremoveable on the ground that she had resided as a fact for the necessary time. Here after the husband's death it became a mere question of fact how long the wife had resided in the Prestwich Union. A widow does not continue irremoveable after her husband's death, unless she has resided in fact for the necessary period: *Reg.* v. *Cudham.* (4) The converse of this is true, and a widow is irremoveable who has resided in fact the proper time; her status depends on her own residence, and not on that of her husband. *Reg.* v. *East Stonehouse* (5) turned on the proviso in 9 & 10 Vict. c. 66, s. 1, which excluded the period of service as a marine, &c., "for all purposes," in the computation of the five years' residence then necessary to

(1) 16 Q. B. 352; 20 L. J. (M.C.) 61.

(2) 4 B. & S. 100; 32 L. J. (M.C.) 189.

(3) 2 E. & E. 267; 29 L. J. (M.C.) 17.

(4) 1 E. & E. 409; 28 L. J. (M.C.) 105.

(5) 4 E. & B. 901; 24 L. J. (M.C.) 121.

confer irremoveability. Thirdly, assuming a desertion she was still removeable.

[GROVE, J. On the question of desertion we could only remit the case to the sessions in order to have the state of facts more fully found.]

GROVE, J. In this case the husband and wife resided together until the 22nd of January, 1880, and it is admitted that they would all have been irremoveable, if the husband had then become chargeable. On that day he left for America, intending to reside there; a great deal turns on this. He died on the 13th of March, and his wife became chargeable on the 3rd of May. As a fact the wife resided in the Prestwich Union during the whole period that was necessary in order to confer on her a status of irremoveability; and the only question is whether the break in the husband's residence and change in his status affected the wife; whether, if I may use the expression, it enured to the wife, so as to deprive her of the benefit of her previous residence, and prevent her from adding that to her own period of residence apart from her husband, by doing which she would restore her own quality of irremoveability. I think that is so. It seems almost an absurdity to say that a wife can avail herself of a residence which in the eye of the law is her husband's residence, when there has been a break in the latter, and that she can at any time after her husband's death fall back upon the original residence. It is admitted that when he ceased to be irremoveable, she ceased to be so likewise; but it is contended that after his death she can fall back upon that residence which has previously failed her, and re-acquire that condition of irremoveability which she has been deprived of by her husband's break of residence. I am unable to concur in this argument, and I think that the order of sessions was right, and should be affirmed.

LOPES, J. I agree that the order of sessions should be affirmed. It is clear that there was a disruption of residence in fact on the 22nd of January, and *Reg.* v. *Llanelly* (1) casts on the other side, under such circumstances as those in the present case, the onus of shewing an animus revertendi; I think that in the present

(1) 17 Q. B. 40; 20 L. J. (M.C.) 179.

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case the sessions was right in inferring from the facts that there was no intention to return. The effect of the husband's break of residence was to break that of the wife also, so far as it could confer a status of irremoveability.

BOWEN, J. I am not prepared to differ from the view that the break of the husband's residence was a break of the residence of the wife, and that, although the wife had in fact resided the required year, her residence was not such a residence as is contemplated by the 1st section of 9 & 10 Vict. c. 66.

Order affirmed, with costs.

Solicitors for appellants: *Johnson & Weatheralls, for A. Lings, Manchester.*

Solicitor for respondents: *Crofton, Manchester.*

J. R.

Nov. 19.

[CROWN CASE RESERVED.]

THE QUEEN *v.* MARTIN.

*Criminal Law—Inflicting Grievous Bodily Harm—Malice—*24 *&* 25 *Vict. c.* 100, *s.* 20.

Shortly before the conclusion of a performance at a theatre, M., with the intention and with the result of causing terror in the minds of persons leaving the theatre, put out the gaslights on a staircase which a large number of such persons had to descend in order to leave the theatre, and he also, with the intention and with the result of obstructing the exit, placed an iron bar across a doorway through which they had in leaving to pass.

Upon the lights being thus extinguished a panic seized a large portion of the audience, and they rushed in fright down the staircase forcing those in front against the iron bar. By reason of the pressure and struggling of the crowd thus created on the staircase, several of the audience were thrown down or otherwise severely injured, and amongst them A. and B.

On proof of these facts the jury convicted M. of unlawfully and maliciously inflicting grievous bodily harm upon A. and B.:—

Held, by the Court (Lord Coleridge, C.J., Field, Hawkins, Stephen, and Cave, JJ.), that M. was rightly convicted.

AT the general quarter sessions for the borough of Leeds, held on the 4th of July, 1881, Edwin Martin was tried upon an indictment charging that he did unlawfully and maliciously

inflict grievous bodily harm upon George Pybus against the form of the statute, &c., and, by a second count, that he did unlawfully and maliciously inflict grievous bodily harm upon Martin Dacey against the form of the statute, &c.

The indictment was framed on the 20th section of 24 & 25 Vict. c. 100.

The evidence for the prosecution was to the following effect:—

The gallery in the Theatre Royal at Leeds is reached from the street by a stone staircase, which is lighted by three gaslights, of which one is at the top, one on a landing about the middle, and the third over the door of the pay office, which is at the bottom of the stairs. These lights are all fastened to the walls at the height of seven feet or thereabouts above the stairs or landings. Between the street and the bottom of the staircase there are a pair of folding-doors opening outwards into the street. Each of these doors is divided into halves, of which the halves nearest to the door-posts or walls on each side can be kept closed by means of strong iron bars let into sockets in the stonework of the staircase, and connected with the doors by iron bolts. These bars are moveable. The practice was to open only the central halves of the doors whilst the audience were assembling and passing the pay office, so as to limit the number of those who could pass in at the same time, and to remove the iron bars and open the whole of the doors some time before the conclusion of the performance, so as to allow the audience to pass out into the street more quickly.

It was proved that on the night of the 30th of April, 1881, shortly before the conclusion of the performance, the folding-doors were opened to their full extent, and the iron bars placed against the wall of the staircase to the right hand of a person leaving the theatre, and close to the door, according to the usual practice.

The evidence shewed that the gallery on this night was filled to the extent of about three-fourths of its total capacity.

The defendant (who was well acquainted with the theatre, having assisted on several occasions as a supernumerary) was proved to have been in the gallery on this night, and to have been the first, or almost the first, to leave it, at the conclusion of the performance. It was proved that he ran quickly down the gallery

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staircase, and that as he did so he reached up with his hand and put out the gaslight on the middle landing, and also that over the pay office.

It was also proved that as he passed out into the street he took one of the iron bars which was leaning against the wall close to the door on his right hand side, and threw it or placed it partly across the doorway. Almost immediately after this had been done by the defendant the whole of the folding-doors became closed. The evidence as to how this occurred was extremely vague. The result however of the doors being closed and the lower lights extinguished was to leave the lower part of the gallery stairs in almost entire darkness.

Almost immediately after the lights were put out, a panic seized the audience, who rushed down stairs and endeavoured to find their way into the street. In consequence of the presence of the iron bar, which the defendant had placed or thrown across one part of the doorway, and of the doors being shut, it was some time before any of them could reach the street, and in the meantime the pressure from behind forced those in front against and under the iron bar and against the doors, and a large number of persons were very seriously injured and had to be removed to the infirmary. Amongst those injured were George Pybus and Martin Dacey. The medical evidence was to the effect that George Pybus shewed signs of fracture of the base of the skull, which was probably caused by his slipping and falling backwards as he was running down the stairs after the gaslights had been extinguished, and so striking his head upon the stairs, and that Martin Dacey was suffering from collapse, the result of partial suffocation arising from the pressure to which he had been subjected in the crowd on or at the foot of the stairs.

It was clearly proved that the defendant was on the stage of the theatre after the accident assisting the injured persons who had been brought there. There was no evidence of any previous quarrel or dispute between him and the managers or officials of the theatre, or between him and any person in the gallery.

The defence set up for the defendant was an alibi.

In summing up the evidence to the jury the learned Recorder directed them that malice was an essential ingredient in the

offence charged against the defendant, and intimated to them that if they were of opinion that the conduct of the defendant in extinguishing the lights and throwing the iron bar across the doorway amounted to nothing more than a mere piece of foolish mischief they might acquit him; but that if they believed the acts were done with a deliberate and malicious intention they ought to convict.

The following questions were left to the jury:

1. Did the prisoner extinguish the gaslights, or either of them?

2. Did he place or throw the bar across the doorway in such a manner as to make the means of exit more difficult?

3. If he did extinguish the lights or either of them, did he do so with the intention of causing terror and alarm in the minds of the persons leaving the gallery?

4. If he did throw or place the bar across the doorway, did he do so with the intention of wilfully obstructing the means of exit from the gallery?

5. Were Pybus or Dacey, or either of them, injured by reason of any of the acts of the prisoner? and if so by which of them?

The jury found the defendant guilty, answered the first four questions in the affirmative, and stated that they found that both Pybus and Dacey were injured by reason of each of the acts of the defendant mentioned in the first and second questions.

The question for the consideration of the Court was, whether the defendant was properly convicted on the above facts and finding of the jury.

No counsel appeared.

LORD COLERIDGE, C.J. I am unable to entertain any doubt as to the propriety of this conviction. The prisoner was indicted under 24 & 25 Vict. c. 100, s. 20, which enacts that "whosoever shall unlawfully and maliciously wound, or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, &c."

The learned judge after stating the facts, continued: Upon these facts the prisoner was convicted, and the jury found all that

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was necessary to sustain the conviction. The prisoner must be taken to have intended the natural consequences of that which he did. He acted "unlawfully and maliciously," not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured. Just as in the case of a man who unlawfully fires a gun among a crowd, it is murder if one of the crowd is thereby killed. The prisoner was most properly convicted.

FIELD and HAWKINS, JJ., concurred.

STEPHEN, J. I am entirely of the same opinion, but I wish to add that the Recorder seems to have put the case too favourably for the prisoner, for he put it to the jury to consider whether the prisoner did the act "as a mere piece of foolish mischief." Now, it seems to me, that if the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse, he did it "wilfully," that is "maliciously," within the meaning of the statute. I think it important to notice this as the word "malicious" is capable of being misunderstood. Lord Blackburn (then Mr. Justice Blackburn) in the cases of *Reg.* v. *Ward* (1) and *Reg.* v. *Pembliton* (2), lays it down that a man acts "maliciously" when he wilfully and without lawful excuse does that which he knows will injure another.

CAVE, J., concurred.

Conviction affirmed.

No Solicitors were instructed.

(1) Law Rep. 1 C. C. R. 356, 360. (2) Law Rep. 2 C. C. R. 119, 122.

C. D.

THE PICKERING LYTHE EAST HIGHWAY BOARD, APPELLANTS; BARRY, RESPONDENT.

1881
Dec. 1.

Highway—Highways and Locomotives Amendment Act, 1878 (41 & 42 *Vict.* c. 77), s. 23—*Excessive Weight—Extraordinary Traffic—Traffic caused in building a House.*

Materials for building a house were carried by the respondent over a highway, and he was summoned under s. 23 of the Highways and Locomotives Amendment Act, 1878, by the appellants to recover the amount of expenses incurred by them by reason of the damage to the highway. The justices dismissed the summons, subject to a special case in which they found that the traffic conducted by the respondent was in aggregate weight and in quantity excessive and extraordinary as compared with the ordinary traffic along the highway, which was light agricultural traffic, that the highway had been damaged thereby, that the amount expended on the highway by reason thereof was in excess of the average expense of repairing highways in the neighbourhood, and was an extraordinary expense incurred by reason of such damage, but that the traffic did not materially differ in character from that to be expected on the highway:—

Held (by Grove and Lopes, JJ.), that the respondent was not liable for the damage to the highway.

CASE stated by justices for the North Riding of Yorkshire, under 20 & 21 Vict. c. 43.

A complaint was preferred by the appellants that extraordinary expenses to the extent of 15*l.* 2*s.* 8*d.* had been incurred by them, as the highway authority in repairing certain highways, by reason of the damage caused by excessive weight passing along the same or extraordinary traffic thereon, namely, carts laden with bricks, stone, lime, sand, timber, and other building materials used in the construction of a dwelling-house, stables, coach-house, vinery, outbuildings and wall, and conducted over the said highways by order of the respondent.

It appeared from the case that the ordinary traffic on the highways is light agricultural traffic, although occasionally a waggon laden with manure or lime weighing about a ton and a half or more passes along the highway, but ordinarily there is so little of this heavy traffic that it does not affect the wear and tear of the highway to any appreciable extent.

In October, 1879, the respondent commenced to build a dwelling-house and outbuildings at Lindhead, and he caused to be carted along the highways between October, 1879, and April, 1880, large quantities of bricks, stone, lime, sand, timber, and

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other building materials which were used in the construction of the dwelling-house and outbuildings.

The materials were carted in carts which generally contained 30 or 35 cwt. each. The carts were almost daily on the road during a great portion of the period between October and April. Each of the carts was drawn by two horses, and required the assistance of an additional horse at certain parts of the highways. The weight of the loads was frequently such that the drivers of the carts when going down hill used and were obliged to use "trails" to take the strain off the horses. The use of the trails caused part of the damage to the highways complained of by the appellants. The ordinary traffic on the highway was and is conducted without the use of trails.

The traffic which the respondent caused to be conducted during the period mentioned, was in aggregate weight and in quantity excessive and extraordinary as compared with the ordinary traffic along the highways, and was in extent greatly in excess of the total amount of traffic which ordinarily passed along the highways during a period of two or three years.

The portion of the highways used by the respondent for his traffic was damaged thereby, and a sum of 15*l.* 2*s.* 8*d.* was necessarily expended by the appellants in repairing the damage. The weight and quantity of the traffic of the respondent alone occasioned the expenditure of the sum of 15*l.* 2*s.* 8*d.*, and but for that traffic the expenditure would have been unnecessary.

The amount expended on the highways was by reason of the damage so caused by the respondent's traffic as aforesaid greatly in excess of the average expense of repairing highways in the neighbourhood, and the sum of 15*l.* 2*s.* 8*d.* is an extraordinary expense caused by reason of the damage done to the highways by the respondent's traffic.

The appellants claimed to be entitled to an order directing the respondent to pay to them the sum of 15*l.* 2*s.* 8*d.* as extraordinary expenses incurred by them within s. 23 of the Highways and Locomotives (Amendment Act) 1878.

The respondent contended that s. 23 of the Highways and Locomotives Amendment Act, 1878, did not apply in a case where the damage was caused by an extraordinary quantity of traffic which differed not materially in character, but chiefly in its

weight and amount from the traffic to be expected on the highways, and cited the judgment of Grove, J., in the case of *Lord Aveland* v. *Lucas* (1), as an authority in support of his contention.

The justices were of opinion that the solicitor for the respondent was right in his contention, and that the section did not apply to entitle the appellants to an order for the payment of the sum of 15*l.* 2*s.* 8*d.*, and dismissed the summons accordingly.

A. Wills, Q.C. (*Gainsford Bruce*, with him), for the appellants, contended that, on the facts stated, the respondent ought to have been convicted, and referred to *Lord Aveland* v. *Lucas* (1), *Wallington* v. *Hoskins* (2), *Williams* v. *Davies* (3), and *Reg.* v. *Williamson.* (4)

The respondent did not appear.

GROVE, J. I think this is one of the class of cases in which the Court would not interfere unless they saw that the decision of the justices was clearly wrong, because the question must be to a great extent one of fact, and the decision must to a great extent depend on the nature of the locality and on knowledge of what is the ordinary traffic. I should therefore not reverse the decision unless I were of opinion that the justices were clearly wrong. The facts set out in the case do not satisfy me of this. The justices knowing the nature of the road, the nature of the ordinary traffic, and the wants of the neighbourhood, have found in the respondent's favour, and I cannot say that they are wrong. I do not wish to rest the decision of this case on the words I used in giving an illustration in the case of *Lord Aveland* v. *Lucas.* (5) In speaking of "some extraordinary quantity of traffic caused by the carriage of materials for the building of a mansion," I did not intend to use the word "mansion" as meaning more than an ordinary house, and I by no means say there might not be excessive weight or extraordinary traffic where some big building, as for instance a college, is constructed, but in the case of an ordinary dwelling house, there seems to me to

(1) 5 C. P. D. 211, at p. 222, reported on appeal at p. 351.
(2) 6 Q. B. D. 206.
(3) 44 Justice of the Peace, 347.
(4) 45 Justice of the Peace, 505.
(5) 5 C. P. D. at p. 222.

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be nothing of an exceptional character, especially when one considers that farm buildings, barns, and the like are constantly being required to be constructed or renewed. I will not attempt to define what I think is incapable of very accurate definition, but I will content myself by saying that it seems to me that the traffic in this case was only a greater amount of the same traffic as was used before on the road, and that there was nothing exceptional about it to bring it within the statute.

LOPES, J. It is sought here to charge the respondent with an exceptional burden, that is, one beyond that cast on the other ratepayers, because he has used the road in an exceptional way. Notwithstanding the warnings that have been given as to the inadvisability of framing a definition, I find it difficult to come to a decision in the case without defining the matter, at all events in my own mind, and I should do so thus. I think the legislature intended something unusual in weight, or extraordinary in the kind of traffic, either as compared with what is usually carried over roads of the same nature in the neighbourhood, or as compared with that which the road in its ordinary and fair use may be reasonably subjected to. It would not be sufficient to compare the weight and traffic complained of with traffic usually carried on the particular road; it might be the traffic was usually of the lightest kind, but surely the legislature never intended that a man was not to use the road for carrying materials for building a dwelling house, farmhouse, or barn, provided he used it in a reasonable way for those purposes. The comparison must be larger, and I think the definition I have given, if not exhaustive, will be found useful. If it is a correct definition, the facts stated do not bring the case within it, and the magistrates have come to a right conclusion. I will only add that I quite agree that this is a case in which we should be reluctant to interfere with the decision of the magistrates, who have from their knowledge of the matters special opportunities for arriving at a correct decision.

Judgment for the respondent.

Solicitors for appellants: *Williamson, Hill, & Co., for G. Taylor, Scarborough.*

A. M.

[IN THE COURT OF APPEAL.]

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Nov. 14.

CLARKE *v.* BRADLAUGH.

Time from which Writ takes effect—Day, Fractions of—Writ of Summons issued on the same day as Cause of Action accrued—Fiction of Law—Distinction between original and judicial Writ—Effect of Statute Law Revision Act, 1875, *on Parliamentary Oaths Act*, 1866 (29 *Vict. c.* 19), *and Promissory Oaths Acts*, 1868 (31 *&* 32 *Vict. c.* 72).

To issue a writ of summons is not a judicial act, and the Court may inquire at what period of the day it was issued.

It appeared from the statement of claim that the writ of summons in the action was issued on the 2nd of July, and that the cause of action arose on the same day, but before the issue of the writ. The statement of claim was demurred to on the ground that the issuing of the writ was a judicial act, and must, therefore, be presumed to have taken place at the earliest moment of the day, before the cause of action accrued:—

Held, affirming the judgment of the Queen's Bench Division, that the Court could inquire whether or not the writ was in fact issued after the cause of action accrued.

The penal clauses of the Parliamentary Oaths Act, 1866, are not repealed by the Statute Law Revision Act, 1875.

APPEAL by the defendant from the judgment of Denman and Williams, JJ. (1), on a demurrer to a statement of claim in an action against the defendant for a penalty of 500*l.*, for having sat and voted in the House of Commons without having taken the oath prescribed by the Parliamentary Oaths Act, 1866, (29 Vict. c. 19), as amended by the Promissory Oaths Act, 1868, (31 & 32 Vict. c. 72).

It appeared from the statement of claim that the writ of summons was issued on the 2nd of July, 1880, and that the defendant had sat and voted upon the same day, but before the issuing of the writ. The defendant demurred to this statement of claim, on the ground that it disclosed no cause of action, inasmuch as it alleged that the defendant sat and voted on the day on which the writ was issued, and it was from the judgment overruling this demurrer that the defendant now appealed.

The *defendant in person.* The statement of claim is bad,

(1) 7 Q. B. D. 151.

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because it shews that the alleged offence in respect of which the writ issued was committed after the issue of the writ. All judicial acts are presumed in law to have taken place at the earliest period of the day on which they are done, and this is a rule which will be applied, even though the application of it be contrary to common sense: *Wright* v. *Mills* (1); *Edwards* v. *Reg.* (2) Moreover in a penal action the Court will presume everything against a plaintiff; and will consider any sort of legal defence to be sufficient. The rule laid down by the Court below, that the object of a fiction is to do justice, has no authority to support it.

Secondly, the issue of a writ of summons is a judicial act. The Rules of the Supreme Court prescribe that every action must be commenced by writ of summons; the writ is in form issued in the name of the Sovereign, and tested by the Lord Chancellor, and it was until modern times prepared by an officer of the Court. It is, therefore, not the act of the party, but the act of the Court; it is the statement of claim which is the act of the party. The writ derives its authority from the Sovereign by sanction of Parliament: Co. Lit. 54 b; 27 Hen. 8, c. 24; 13 Car. 2, st. 2, c. 2.

If more than one action be commenced on the same day for the same penalty, each may be pleaded in bar to the other: *Pye* v. *Coke.* (3)

[He also cited *Lord Porchester* v. *Petrie* (4); *Alston* v. *Underhill* (5); *Westman* v. *Aktiebolaget, &c., Co.* (6); *Shelley's Case* (7); *Estwick* v. *Cook* (8); Co. Lit. 54 b, 73 b, 121 a, 191 a; Lush's Practice, p. 887; Brown and Hadley's Commentaries, vol. iii. p. 211; Bac. Abr. 7th ed. tit. "Court of Chancery," p. 448; Wharton's Law Lexicon, 5th ed. tit. "Judicial Writ," p. 514.]

Moreover, the Parliamentary Oaths Act, 1866, is repealed, as far as the penalty is concerned, by the Statute Law Revision Act, 1875. The Promissory Oaths Act, 1868, reads a new form of oath into the Parliamentary Oaths Act, 1866, but enacts no penalty for not taking the oath; recourse must be had to the Act of 1866

(1) 5 Jur. (N.S.) 771; 4 H. & N. 488.
(2) 9 Ex. 628.
(3) Moore, 864.
(4) 3 Doug. 261.
(5) 1 Cr. & M. 492.
(6) 1 Ex. D. 237.
(7) 1 Rep. 93 b.
(8) 2 Ld. Raym. 1557.

for such penalty. But the Statute Law Revision Act, 1875, in repealing the Act of 1866 "so far as the form of oath is concerned," has repealed also the section of that Act which imposes the penalty.

Sir H. Giffard, Q.C., and *Kydd* for the plaintiff. The fiction on which the defendant relies is applicable solely to judicial acts so described in the cases themselves, in which it has been applied. In no case has the fiction been applied to the case of a writ of summons, which is the act of the party, not the act of the Court. Although the law does not in general allow of fractions of a day, yet it does so in case of necessity, and even the time and the very hour may be shewn where material: *Combe* v. *Pitt.* (1)

[They also cited *Johnson* v. *Smith* (2); *Mostyn* v. *Fabrigas.* (3)]

The penal clauses of the Parliamentary Oaths Act, 1866, are expressly kept up by s. 8 of the Promissory Oaths Act, 1868, which enacts that "all the provisions" of the Act of 1866 "shall apply to the oath substituted" by that section for the oath prescribed by the Act of 1866; and the repeal of s. 1 of the Act of 1866, "as to the form of oath thereby prescribed" by the Statute Law Revision Act, 1875, is merely formal, and has no material effect whatever.

The *Defendant*, in reply.

LORD COLERIDGE, C.J. I am of opinion that this demurrer ought to be overruled, and that the judgment of the Court below was correct. The defendant has contended that there is a principle of law, for which great authorities have been cited, that the law takes no regard of fractions of a day, that a writ must be taken to refer to the first moment of the day on which it is issued, and that a writ of summons is a writ within the meaning of the rule, so that the writ in this case was issued before the penalty could have been incurred. I am of opinion that, having regard to the authorities and the reasons for them, there has been a distinction taken between various kinds of writs, and that this distinction is as old as the rule upon which the defendant relies and of the same authority. It might perhaps be

(1) 3 Burr. 1434. (2) 2 Burr. 950.
(3) 1 Sm. L. C. 7th ed. 658.

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also found, though it is not for us on the present occasion to decide, that even of two judicial acts done on the same day, the Court would inquire, if it were necessary, which was done at the earlier time of the day. From the report of *Pye* v. *Coke* in Lord Hobart's Reports (1), it appears that the general rule was recognised, but that leave was given to amend, in order that the party might plead the truth and fact. I do not therefore recognise the universality of the rule even as to judicial acts.

But I base my judgment on the safer and unassailable ground that there is an essential distinction between the writ commencing the action and the writs issued in the course of the action. In Jacob's Dictionary, tit. Writ, it is said, "The writs in civil actions are either original or judicial; original writs are issued out of the Court of Chancery, for the summoning a defendant to appear and are granted before the suit is begun, to begin the same; and judicial writs issue out of the Court where the original is returned, after the suit is begun." This is to the same effect and almost in the same words as Coke Lit. 73 b, and is borne out by the words of Lord Mansfield, C.J. in *Lord Porchester* v. *Petrie*: (2) "The question in all the cases cited," he says, speaking of *Pye* v. *Coke* (1) and similar cases, "was the priority of the commencement of the suit, which is the act of the party, while the judgment is the act of the Court."

Such being the distinction drawn by judges and books of great authority, the question is, what kind of writ is this? I am of opinion that it is the act of the party, just as much as the original writs issued before the Uniformity of Process Act were the acts of the party. The Uniformity of Process Act was superseded by the Common Law Procedure Act, 1852, and the Common Law Procedure Act, 1852, by the Judicature Acts and Rules of Court. The Rules of Court provide that "every action shall be commenced by writ of summons," and the defendant admitted in his ingenious and able argument, that the writ was issued by the party and could not, mero motu, be issued by the Court.

The defendant's second point is very ingenious. It is founded on particular expressions to be found in three Acts of Parliament. The Parliamentary Oaths Act, 1866, prescribes a form of oath and

(1) Hobart, 128.

(2) 3 Doug. at p. 273.

a penalty for not taking the oath. The Promissory Oaths Act, 1868, alters the form of oath and re-enacts the provisions of the Act of 1866. The Statute Law Revision Act, 1875, repeals the Act of 1866 so far as the form of oath is concerned. I know the difficulties which arise from amendments being made in Parliament, without the whole scope of a bill being present to the minds of the members moving the amendments, and I know that the result is often to give an unexpected effect to an Act of Parliament when it is passed. Perhaps the Promissory Oaths Act, 1868, may not be very happily expressed, but the effect of it is to alter the form of oath prescribed by the Parliamentary Oaths Act, 1866, and to apply the provisions, including the penalties, of the Act of 1866, to the form so altered. The Statute Law Revision Act, 1875, has repealed the form of oath in the Act of 1866, but has repealed no more.

BAGGALLAY, L.J. I am of the same opinion. The statement of claim alleges that the writ issued after the defendant had sat and voted, but we are asked to disregard this allegation (which for the purposes of this case must be taken to be admitted) on the ground of a fiction of law. Now the authorities seem to establish that judicial acts are referred to the first moment of the day, although I do not desire to be considered as holding this to be an inflexible rule.

In my opinion this case is concluded by *Combe* v. *Pitt* (1), in which case it was held that in an action for penalties for bribery another action of the same term, unless actually prior in point of time, could not be pleaded in abatement. Lord Mansfield bases his judgment in that case on *Hutchinson* v. *Thomas* (2) and *Jackson* v. *Gisling*. (3) He says, " *Hutchinson* v. *Thomas* (2) was an information for usury. The memorandum was of Michaelmas Term. The defendant pleaded ' that ante exhibitionem informationis, scilicet the same term, another person exhibited an information also against him for the same usury, and obtained judgment against him.' Upon which the informer demurred, and had judgment; for both informations as those pleaded refer to

(1) 3 Burr. at p. 1433. (2) 2 Lev. 141. (3) 2 Lev. 141.

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the first instant of the same term. But if another information was exhibited before, in the same term, the defendant should have pleaded 'that the information pleaded to was exhibited such a day of the term; and that, at another day before in the same term, another information was exhibited and judgment thereupon obtained.'" And *Jackson* v. *Gisling* (1) was to the same effect. This seems to shew that the Court will inquire at what period of the day a writ was issued, and I almost feel disposed to say that I should be sorry if an authority could be found to the contrary and contrary to common sense.

As to the second point, I am of opinion that all the provisions of the Act of 1866 as to penalties are in full force.

BRETT, L.J. The defendant's argument is that the Court will not inquire into the time when this writ was issued, on the ground that the issuing it was a judicial act, it being admitted that, if it were the act of the party, the time could be inquired into. *Edwards* v. *Reg.* (1), in which the distinction is taken between the act of the party and the act of the Court, is clearly binding upon us. The question is therefore whether the issuing a writ of summons is a judicial act. I am of opinion that it is not. If two informers were to issue a writ on the same day I should think that the Court could inquire which of the two writs issued first, but that is a point which it is not necessary to decide, for there are not two plaintiffs suing on the same day here. As for the rule that judicial acts relate back to the earliest moment of the day, I know of no principle on which it can be founded. It is an artificial rule, declared for a long number of years to be a part of common law procedure, and therefore it is to be assumed to be as old as the common law itself. But it is to be applied in the same way as it was applied when first promulgated. The question is whether those who promulgated the rule declared the issuing of a writ to be the act of the party, or whether they declared it to be the act of the Court.

I think that they declared it to be the act of the party, and for these reasons. The writ is issued before the action commences, it

(1) 9 Ex. 628.

is issued on the application of the party, it cannot be issued without the application of the party, and it cannot be refused. For this we have the high authority of Jacob, and also of Lord Mansfield in *Lord Porchester* v. *Petrie.* (1)

As to the second point, it is a most ingenious one, but it obtains its colour only from the form in which the Act of 1866 has been amended by the Act of 1868, and partially repealed by that act of supererogation, the Statute Law Revision Act of 1875. It is an argument which entirely fails in substance, for not only are all the provisions of the Act of 1866, except as to the form of oath, expressly preserved by the Act of 1868, but there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second.

Appeal dismissed.

Solicitor for plaintiff: *W. G. Stuart.*
Solicitors for defendant: *Lewis & Lewis.*

J. E. H.

[IN THE COURT OF APPEAL.]

Nov. 11.

ILES, APPELLANT; THE ASSESSMENT COMMITTEE OF WEST HAM UNION AND OTHERS, RESPONDENTS.

Poor-rate—Rating of Owners instead of Occupiers under "Sturges Bourne's Act," 59 Geo. 3, c. 12, s. 19—Whether Owners rateable, where Weekly Rent amounting to more than 20l. by the Year.

By 59 Geo. 3, c. 12, s. 19, the vestry of any parish may resolve that the owners of all houses in the parish, being the immediate lessors of the actual occupiers, which shall be let "at any rent not exceeding twenty pounds by the year for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months," shall be assessed to the rates in respect of such houses, instead of the actual occupiers:—

Held (by Lord Coleridge, C.J., and Brett, L.J., Baggallay, L.J., dissenting), that this section has no application to houses let at a weekly rent amounting to more than twenty pounds by the year.

This was a case stated by way of appeal from the Assessment

(1) 3 Doug. at p. 373.

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Committee of West Ham Union, in the county of Essex, the material facts being as follows:—

By a resolution passed in 1846 by the inhabitants of West Ham, in vestry assembled, it was resolved:—"That this vestry resolve and direct under the authority of 59 Geo. 3, c. 12 (1), that the churchwardens and overseers of the poor of this parish assess the owner or owners of all houses, apartments, or dwel-

(1) 59 Geo. 3, c. 12, s. 19: "Whereas in many parishes, and more especially in large and populous towns, the payment of the poor's-rates is greatly evaded, by reason that great numbers of houses within such parishes are let out in lodgings or in separate apartments, or for short terms, or are let to tenants who quit their residences or become insolvent before the rates charged on them can be collected; and it hath been found that in many instances the persons letting such houses do actually charge and receive much higher rents for the same, upon the ground and expectation that the occupiers thereof cannot be effectually assessed to the poor's-rates, and will not be charged with or required to pay such rates, and do thus obtain an undue advantage to themselves, and by means of the premises the other inhabitants of such parishes are unjustly compelled to pay much more than their fair and due proportions of the charges of relieving and maintaining the poor; for remedy thereof be it enacted, that it shall be lawful for the inhabitants of any parish, in vestry assembled, and they are hereby empowered, to resolve and direct, that the owner or owners of all houses, apartments, or dwellings in such parishes, being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof at any rent or rate not exceeding 20*l.* nor less than 6*l.* by the year, for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months, shall be assessed to the rates for the relief of the poor, for or in respect of such houses, apartments, or dwellings, and the outhouses and curtilages thereof, instead of the actual occupiers; and the inhabitants so assembled in vestry may, and they are hereby authorized from time to time to rescind, renew, vary, and amend every such resolution and direction as they shall see occasion, so as no such resolution or direction shall extend to assess or charge the owner of any house, apartment, or dwelling, which shall, with the outhouses and curtilages thereof be let at a greater rent than 20*l.* or less than 6*l.* as aforesaid; and the churchwardens and overseers of the poor of every such parish are hereby empowered and required to carry into effect all such resolutions and directions of the inhabitants in vestry assembled, and in pursuance and execution thereof, in all rates to be by them made for the relief of the poor, to assess by a fair and equal pound rate the owner or owners, being the immediate lessor or lessors of the actual occupier or occupiers of every house, apartment, or dwelling to which such resolution and direction shall extend, for or in respect of the same, according to the actual rent at which every such house, apartment, or dwelling shall be let, after making a reasonable deduction from such rent, not exceeding in any case one-half of the same."

lings, and curtilages thereof, to the rates for the relief of the poor, instead of the actual occupier or occupiers, wherever the said houses, apartments, and curtilages thereof, shall be let at any rent not exceeding twenty pounds nor less than six pounds by the year for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months; and further that the vestry resolves and directs that the owner or owners of the before described rateable property to the poor rate shall be assessed upon one-half of the actual rent at which the same shall be let." Such resolution had never been rescinded.

In April, 1879, Mr. Iles in pursuance of this resolution was, by a rate made by the churchwardens and overseers, rated in respect of certain houses situate in the said parish of which he was not in occupation, otherwise than as being in receipt of the rents from the respective tenants. Some of the houses were empty, and the others were let to tenants on weekly tenancies at various rentals from 8*s.* to 10*s.* per week. As between himself and his tenants, Mr. Iles was bound to pay and discharge all parochial rates and taxes, and the water rate; and he realised from some of the houses, after payment of such rates and taxes, a net sum of less than 20*l.* per annum; but the weekly rentals amounted in every case to a gross sum of more than 20*l.* per annum. The gross estimated rentals in the rate books ranged from sums of 10*l.* 12*s.* 6*d.*, to 15*l.* 12*s.* 6*d.*, and the rateable value from sums of 8*l.* 10*s.* to 12*l.* 10*s.* The rate was 8*d.* in the pound. The tenants held the houses as weekly tenants, the tenancy in each case being determinable by a week's notice, and the appellant was the immediate lessor.

This assessment was duly entered by the churchwardens and overseers in the valuation list made under the Union Assessment Act of 1862, and confirmed by two justices of the peace.

Mr. Iles objected to the valuation list before the Assessment Committee, on the ground that he was not the occupier of the houses in question, and that the said houses were at the time of the making of the rate, and had since been, let by him, and held by the tenants thereof, at a rent or rate exceeding 20*l.* per annum,

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and that, therefore, he was not liable to be rated as owner in respect of the same, or any of them.

The Assessment Committee having confirmed the valuation list, this case was stated for the opinion of the Queen's Bench Division, and it was agreed that judgment should be entered in conformity with the decision of the Court at the Quarter Sessions for the county of Essex, to be held next or next but one after judgment.

The questions for the opinion of the Court were :—

(1) Whether the appellant was liable to be and was properly rated in respect of the said houses, or any of them.

(2) Whether the appellant was liable to pay the rate in respect of the said houses or any of them.

(3) Whether the rate was a good and binding rate.

If the Court should be of opinion that the appellant was not liable to be rated in respect of any of the said houses, or that the rate was not a good and binding rate, then judgment was to be given declaring the said rate to be bad, and to be quashed so far as the same related to the said houses. If the Court should be of opinion that the appellant was rightly assessed in respect of the whole or some one or more of the said houses, then the said rate was to be confirmed or altered accordingly.

A. Wills, Q.C., and *Tindal Atkinson*, for the appellant.
F. M. White, Q.C., and *H. B. Mugliston*, for the overseers.
Woollett, for the Assessment Committee.

June 3. HUDDLESTON, B. It is contended by the appellant, that the words "any agreement by which the rent shall be reserved, or made payable at any shorter period than three months," in 59 Geo. 3, c. 12, s. 19, are governed by the previous portion of the section which fixes the value of the property as between 20*l.* and 6*l.*, and that, therefore, in the cases in which he is rated, and the holding is for less than three months, and the value is more than 20*l.*, he is not liable to be rated. At first I was inclined to be of opinion that that was the true construction of the section, in consequence of the proviso to which I shall have

to refer presently. But I have come after careful consideration to the conclusion that the meaning of the section is in substance this; that the vestry may direct that the owner shall be assessed in two classes of cases; one, where the occupation of the tenement is for a term less than a year, and for a rent between 20*l.* and 6*l.* by the year; the other, where the tenement is held under an agreement, to use the words of the section, whereby the rent is made payable at shorter periods than three months. I must go the whole length of saying that if lodgings were let at the rate of 1000*l.* a year for a term less than three months (I put 1000*l.* a year as a nominal value), then the owner may under the provision of this section be rated instead of the occupier. One main consideration which has induced me to arrive at this conclusion is this, that if the intention of the legislature were that the powers of the vestry should be limited to the sums of 20*l.* and 6*l.*, and upon premises let for a period less than a year, it would have been utterly useless to introduce the provision "or on any agreement by which the rent shall be reserved, or made payable at any shorter period than three months"; because if the rent were reserved for a period less than one year, there would have been no use in introducing the words "any agreement by which the rent should be reserved or made payable at any period shorter than three months." But as the words have been introduced, they must have some meaning given them, and the meaning seems to be clearly this; that looking to the evil arising in the parish from a number of premises being let for short periods, the occupiers going away, and the parish losing the rates, a resolution may be passed rating owners instead of occupiers, in respect of two classes of premises, one, where the premises are let for a period less than a year, and where the rent is between 20*l.* and 6*l.*, by the year; and the other, where the premises are let on an agreement whereby the rent is payable at less periods than three months, no matter what the rent may be. The reason is obvious: a man who takes chambers or lodgings for a period of six weeks, or eight weeks, where the rates are made every three months, would escape altogether, The parish say, the premises ought to be rated; we cannot get the rate from these persons, because they are constantly going away, and therefore, we

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will make the landlord liable, and he can recoup himself by taking it out of the rent. The only difficulty that arises is from the proviso, that the vestry may from time to time, pass an amending resolution, "so as no such" amending resolution shall extend to assess the owner of any house, &c., which shall "be let at a greater rent than 20*l.* or less than 6*l.* aforesaid." At first sight this seems to mean that the first branch of the section is only applicable to cases between 20*l.* and 6*l.*; but I think that Mr. White satisfactorily explained that the proviso merely applies to the case of houses let for less than a year, where the rent or rate is between 20*l.* and 6*l.* by the year, and for this reason. You, the parish, may if you choose vary the amount, you may say that the owner shall be liable where the rent is 19*l.*, or where the rent is 16*l.*, or where the rent is 7*l.*, instead of the occupier, but shall not in any case where you apply that rule in reference to houses between 20*l.* and 6*l.*, go beyond the 20*l.*, or below the 6*l.* But the other case comprised within the words, "Whereby the rent is payable at a less period than three months," whatever the amount, comes within the power of the parish to pass a resolution to make the owner liable instead of the occupier. At first I was very much inclined to think that from the year 1819 to the pressnt day, the parishes have been doing what was wrong, but now I have come to the conclusion that they have not.

HAWKINS, J. I cannot bring myself to the same conclusion. I read the statute as limiting the powers of the vestry to deal with cases where the rents are not exceeding 20*l.*, or less than 6*l.* There is not to be found in a single text-book any discussion at all upon this section; no explanation as to how it came to be passed, or why the limits of 20*l.* and 6*l.* were fixed; the section is simply copied into the text-books, and one is obliged to collect everything one has to say upon the subject from a consideration of the language itself.

The enacting part of the section is that it applies to houses which are let at rents between 20*l.* and 6*l.*, not, however, to all houses let between those rents, but only to such as are let for shorter periods than a year, or, if let for longer periods than a

year on agreement, making the rent payable at shorter periods than three months. It is contended that the reading ought to be that a less term than one year alone is governed by the amount of rent at which the houses are let, and that the subsequent matter "or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months," applies to any premises, no matter what their value may be, whether 1000*l.* or 2000*l.* a year (and we know there are many properties in the metropolis let at rents quite equal to that); no matter what the term may be for which these premises are let, provided only that the rent is made payable at periods less than three months. I cannot come to that conclusion. I think that the character of the houses which were to be assessed to the landlord instead of to the occupier, is described by being houses between 20*l.* and 6*l.* a year, that those houses are again limited by these two considerations; either houses which are let for a less period than a year, or are let at rents which are reserved and made payable (not tenancies less than three months but where the rent is reserved and made payable), at periods less than three months. I think, too, that this construction is fortified by the subsequent part of the section which gives power to alter the resolutions.

That subsequent part I read as prohibiting the alterations from extending to houses let at a greater rent than 20*l.* or a less rent than 6*l.* "as aforesaid," which means as above mentioned. I read the statute as confining the application altogether to houses where the rents reserved are between 20*l.* and 6*l.* a year. and for that reason I think that these premises are wrongly rated.

As this Court differs in opinion, the rate will stand.

HUDDLESTON, B. The rate will be confirmed, with costs, with leave to appeal.

Mr. Iles, appealed.

Wills, Q.C., and *Tindal Atkinson*, for the appellant. The words "at a rent or rate not exceediug 20*l.* nor less than 6*l.* by the year," govern a whole description of rateable properties, and the words "or on any agreement," &c., do not constitute a separate description of rateable property. Such is the natural and gram-

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matical construction of the section, and such is the construction which best carries out the object of the preamble. If the construction suggested on the other side were adopted, the owners of houses let at weekly rents amounting to 100*l.* a year or even more, might be rated; for without recourse to the limit of the 20*l.* a year, there is no limit whatever. This could never have been the intention of the legislature. Moreover, it is plain from the proviso (though it is not necessary to pray this in aid), that the amending resolution is not to extend to assess the owner of a house "let at a greater rent than twenty pounds as aforesaid," that the appellant's construction of the section is the proper one.

F. M. White, Q.C., and *Mugliston*, for the overseers. The effect of 59 Geo. 3, c. 12, s. 12, is to divide the rateable properties into two classes: 1, where the rent is between 6*l.* and 20*l.* and the term less than a year, and, 2, where the rent is payable at any shorter period than three months. In the latter case there is no limit as to rent. Such a case is well within the preamble, and the difficulty which is suggested of occupiers at 1000*l.* a year rent escaping rates is only a theoretical one; for in practice, where the rent is high, the rent is not reserved at a shorter period than three months. The respondents' construction of the section has been universally adopted for a long period of time and never disputed, and that it is a natural and proper one is shewn by the analogy of s. 211 of the Public Health Act, 1875. (1)

As for the proviso, the amount of rent being immaterial in the case where rent is payable at any shorter period than three months, it has no reference, nor was it intended to have any reference, to such a case.

Woollett, appeared for the assessment committee, but the Court declined to hear him, on the ground that two counsel had been heard for the overseers.

Tindal Atkinson, in reply.

LORD COLERIDGE, C.J. I am of opinion that the formal judgment of the Court below is wrong, and ought to be reversed. The section with which we have to deal is a short Act of Parliament in itself, which begins with a preamble stating the

(1) See *Reg.* v. *Barker*, post, 151.

mischief of the Act, and then proceeds elaborately to redress it. It was passed with reference to the state of the law at the time of its passing, which was that only occupiers were, by 43 Eliz. c. 2, rateable to the relief of the poor. Upon this general law the Act engrafts an exception, to be brought into operation by a resolution of the vestry, for the rating of owners "of all houses, apartments, and dwellings let at any rent or rate not exceeding 20*l.* nor less than 6*l.* by the year for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months." Even without the proviso I should have said that, having regard to the preamble and to the rule of construction that not too great an alteration of the law is to be intended, the words "at any rent or rate not exceeding 20*l.*" are governing words overriding the whole of the enacting part of the section, and that the reasonable construction is that the owners of houses let to the occupiers at a rate not exceeding 20*l.* "for any less term than one year, on any agreement"—which implies an actual agreement to demise for longer than a year—"by which the rent shall be reserved or made payable at any shorter period than three months," that is to say, where the whole of a house is let at a rate which will bring in not more than 20*l.* a year, either on a letting for less than a year, or on a demise for more than a year, on which the rent is reserved for a shorter period than three months, the owners may in either case be ordered to be rated to the rate for the poor, "for and in respect of such houses, apartments, or buildings, and the outhouses and curtilages thereof," instead of the occupiers.

Then comes the second part, which appears to me very much to strengthen the construction I have arrived at. "And the inhabitants," so it runs, "may from time to time rescind, renew, vary, and amend every such resolution and direction as they shall see occasion." These words might extend the power of the vestry, if it were not for the limitation of the proviso that "no such resolution or direction"—which means the original resolution or direction—"shall extend to assess or charge the owner of any house which shall be let at a greater rent than 20*l.*, or less than 6*l.* as aforesaid." Now it seems to me that putting this proviso by the side of the enacting clause, it is intended to cover the whole

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of that resolution which the vestry are empowered to vary. If that be so, then, unless the vestry have power by the resolution to affect houses the rental of which is beyond 20*l.*, it seems to follow that the proviso must be made equal in extent to the enacting power, and as the enacting power for the reasons I have already given has been limited to houses not exceeding 20*l.*, so the proviso and the amending resolution must also be limited in the same way. It has been said, and it is the only argument that has pressed on my mind from the beginning, that the words "let at a greater rent than 20*l.* or less than 6*l.* as aforesaid," are attached to words which, so to say, stopped short of the two classes of demise which are used in the enacting section. The enacting section says "not exceeding 20*l.* nor less than 6*l.* by the year, for any less term than one year, or on any agreement by which the rent shall be reserved, or made payable at any shorter period than three months," and the proviso says, "20*l.* or less than 6*l.* as aforesaid." If "as aforesaid" is to be limited to 20*l.* or less than 6*l.* by the year, then it appears to exclude a term less than a year or a term more than a year in which the rent is reserved in periods less than three months; but if, as I think, it is to be extended to the whole enacting part, then "as aforesaid" means what I have already said it means. I think "as aforesaid" includes the whole of the enacting part and extends to houses let at a rate not exceeding 20*l.*, whether for a term less than a year or whether for a term more than a year, with the rent reserved at shorter periods than three months. It seems to me that is the true grammatical construction that gives an intelligible meaning to the Act of Parliament, and I apprehend that it limits, according to the sound rules of construction, the exemption to the words creating the exemption, and that the moment you depart from the literal and plain meaning of the words which give a perfectly satisfactory and adequate construction to this Act of Parliament, you are involved in very great difficulty. I see no reason for being astute to introduce difficulties into an Act of Parliament which read simply, and, according to the ordinary rules, is free from them. I think, therefore, that the opinion of my Brother Hawkins in the Court below was the right opinion, and that the formal judgment of the Court below must be reversed.

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BAGGALLAY, L.J. I regret that I am unable to take the same view. I should, if I entertained a decided opinion, simply express it, but I express regret also because my own views are, I may say, of a hesitating character. When this appeal was first opened it seemed to me that the decision of the Court below was right; but at the close of Mr. Wills's argument he had convinced me. Mr. Meadows White brought me back to my original view, and Mr. Tindal Atkinson has not removed altogether the difficulties which I then felt. As regards one of the points mentioned by me, however, Mr. Atkinson has removed my doubts. I thought at first that the jurisdiction contended for by the appellant would not give effect to the second alternative in the enacting part. He has removed those doubts, but he has not removed my doubts as regards the proviso. It still appears to me that if full effect is given to the proviso in the way contended for, it will be simply tantamount to striking out the alternative form in the enacting part. Therefore, though with great hesitation, I am unable to concur in the opinion expressed by the Lord Chief Justice.

BRETT, L.J. I am of opinion that this appeal must be allowed. I should hesitate much more if I thought that my Brother Huddleston, who has had great experience in these matters, had had a firm opinion upon this, but it appears to me that he had not. He gives only one reason for his judgment, and upon examination I think that one reason to be untenable. Construing this Act of Parliament according to the ordinary grammatical construction of the English language, and according to the ordinary meaning of the words used, it seems to me that the limitation "at a rent or rate not exceeding 20*l.* nor less than 6*l.* by the year," governs both the subsequent branches of the enactment. The legislature has distinguished, it seems to me, between the terms "rent," "rate," and "reservation of rent." If the limitation of amount be left out, the section reads, "That the owners of all houses in any parishes which shall be let to the occupiers for any less term than one year, or on any agreement by which the rent shall be reserved, or made payable, at any shorter period than three months." Those two phrases both deal with the letting, with

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regard to the term or the length of term. But the first phrase is "for any less term than one year," and the second "or on any agreement." Now if that deals with the terms, it is impossible to say that it is confined to a letting for less than a year; it must apply to a letting for more than a year. Then it leaves the term and deals with the reservation of rent, and you must introduce the words "or on any agreement"—for a term of more than a year—"by which the rent shall be reserved or made payable." Then, turning back again, you will see that there is a dealing with the amount of rent in the previous words, "which respectively shall be let to the occupiers, for any less term than one year, at any rent or rate not exceeding 20*l.* nor less than 6*l.* by the year." Now there cannot be a term of less than a year with a rent by the year; though there can be a term of less than a year with a rent at a rate per year, that is to say, at a rate which, if the letting were for a year, would come to a certain amount, or be within the limits. Therefore, at "any rent or rate" must be at any rent which is at the rate of not exceeding 20*l.* a year. If that be applicable to the payment of the rent, then it seems to me to follow that it governs not only the term "for any less term than one year," but also the next alternative term "on any agreement." The word "agreement" shews that the section is going to deal with a letting which may be for more than a year or less than three years, because the words "on any agreement" would not properly apply to a lease for more than three years, which must be by a deed.

I agree with my Lord that if the enactment had stopped there, reading it according to its grammatical construction, and dealing with the words and differences of phraseology, which are well known in the ordinary English language as applied to lettings, we should see that there are two different terms mentioned, but that the limitation of the amount of rent applies to both of them.

The subsequent part of the section deals with an alteration of the original resolution, the power of alteration being in general terms, but requiring by the proviso to be limited. I should have expected that the limitation of the variation would be equal with the subject-matter of the first resolution, and the force of the proviso seems to me to be this, that it gives a description of the

subject-matter of the first resolution as consisting of houses let at a rent between 20*l.* and 6*l.*, and shews more completely, if possible, that the first resolution was to be confined to rents which in amount were between 20*l.* and 6*l.*

What I venture to say was the sole reason on which my Brother Huddleston proceeded is this. He says, "And the other class of cases is where the premises are let on agreement, whereby the rent is payable at less periods than three months, no matter what the rent may be. The reason is obvious, because a man who takes chambers or lodgings for a period of six weeks or eight weeks, where the rates are made every three months, would escape altogether, and the landlord would always be able to recoup himself." In other words, he reads the stipulation, "or any agreement by which the rent shall be reserved or made payable at any period shorter than three months," as if it were a term of the length of a shorter period than three months. If the term is for a period shorter than three months it is within the first branch, and the second branch is not required at all. Therefore it seems to me that the only reason which induced him to come to the conclusion which he did, is a reason which cannot be supported.

I will only add that I think Mr. Tindal Atkinson has properly explained the introduction of the second paragraph. The owners would have evaded the first branch by doing precisely what he says they would have done, that is to say, they would have made the term more than a year, but they would have made the payments weekly, or less than three months, with a power to take possession if the rent was not paid, in which case it would not be worth while to rate the occupiers, the whole mischief would have continued, and the remedy of the Act would have been evaded. It was to prevent this evasion of the first branch that the subsequent stipulation was put in.

There will be no costs in the Court below, but the costs of this appeal will follow the ordinary course.

Appeal allowed.

Solicitor for the appellant: *Seaton F. Taylor.*
Solicitor for overseers: *Sedgwick.*
Solicitors for assessment committee: *Hillearys & Taylor.*

J. E. H.

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Nov. 24.

[IN THE COURT OF APPEAL.]

HARTMONT *v.* FOSTER.

Practice—Appeal—Costs—Interpleader—Judicature Act, 1873, *s.* 49—*Order I., rule* 2—*Judge at Chambers—Jurisdiction.*

Order I., rule 2, which preserves the procedure and practice under the Interpleader Acts in actions in the High Court, does not contradict s. 49 of the Judicature Act, 1873, which enacts that no order of a judge of the High Court as to costs only, shall be subject to appeal without leave of such judge; and such enactment applies to a judge's order in interpleader as well as in other proceedings.

A judge at Westminster sitting, not in open Court, but as a judge at chambers, has jurisdiction to hear a summons referred to him by the judge at chambers.

THE plaintiff who had claimed under a bill of sale goods which had been seized by the Sheriff of Middlesex, under an execution by Foster against the goods of Walker, had been ordered to proceed to the trial of an interpleader issue in which the claimant was to be plaintiff, and Foster was to be defendant. The interpleader issue was tried before Hawkins, J., at Westminster during last Trinity Sittings, when the plaintiff obtained a verdict.

A summons was afterwards taken out by the defendant at the suggestion of the learned judge, calling on the plaintiff to shew cause why he should not be deprived of his costs, and why he should not pay the defendant's costs.

This summons came on before Cave, J., at chambers, when he referred it to Hawkins, J., notwithstanding a protest against it on behalf of the plaintiff. The summons was accordingly heard by Hawkins, J., at Westminster, sitting not in open court, but as a judge at chambers, when he made an order in the terms of the summons. The plaintiff appealed from this order, but the Divisional Court refused to hear the appeal, on the ground that the order being as to costs only no appeal would lie without leave of the judge, according to s. 49 of the Judicature Act, 1873.

The plaintiff appealed to this Court.

Cock, for the plaintiff. The Queen's Bench Division had power

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to hear, and ought therefore to have heard the appeal, notwithstanding that s. 49 of the Judicature Act, 1873, enacts that no order of the High Court or of any judge thereof "as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or judge making such order," for the order (though one as to costs only), was as to costs of an interpleader, and Order I., rule 2, of the Judicature Act, 1873 (1), expressly preserves the procedure and practice under the Interpleader Acts: *Hamlyn* v. *Betteley* (2) and *Dodds* v. *Shepherd* (3), and that Order I., rule 2, as stated by Lord Selborne, C., in *Hamlyn* v. *Betteley* (4), "must be taken to mean that if no provision be made to the contrary, the practice in interpleader is to retain all the incidents it had before the Judicature Acts." One of those incidents is costs, and *Teggin* v. *Langford* (5) shews that under the old practice there was an appeal from a judge's order as to costs in an interpleader suit. Further, Hawkins, J., had no jurisdiction to make the order as to costs. The summons came before Cave, J., as the judge at chambers, and he had no power without the consent of the parties to send it to another judge for disposal.

[COTTON, L.J. Might not a judge at chambers adjourn a case, and might it not be heard by the judge who attends chambers on some following day.]

When the summons was heard by Hawkins, J., he was sitting Westminster, and not in chambers.

No counsel appeared for the defendant.

BRETT, L.J. I am of opinion that this appeal must be dismissed. I will deal first with the point as to whether Hawkins, J., had jurisdiction to make the order. I think it must be taken that when he made the order he was acting as a judge, sitting,

(1) The following is Order I. rule 2: "With respect to interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Acts, 1 & 2 Wm. 4, c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the Divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence."

(2) 6 Q. B. D. 63.

(3) 1 Ex. D. 75.

(4) 6 Q. B. D. at p. 66.

(5) 10 M. & W. 556.

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not in court, but to determine a summons which had been taken out before a judge at chambers. A judge sitting in chambers does not mean that he is sitting in any particular room, but that he is not sitting in open Court. In this case the summons first came before Cave, J., at chambers, and he desired that it should be heard before Hawkins, J. It is admitted that if he had said Hawkins, J., will be at chambers to-morrow, and I adjourn the summons until then for him to hear it, he could have done so. What he did I think was practically the same thing. He sent the summons to be heard by Hawkins, J., who heard it, sitting, not in open court, but as a judge at chambers. It seems to me, therefore, that he had jurisdiction to make the order.

Then as to the other point. The order was made in an interpleader proceeding and as to costs. The plaintiff appealed against the order to the Divisional Court, and that Court held that it had no jurisdiction to hear it as the order was as to costs only, and the question now before us is whether there can be such appeal. It is admitted that there could not if it was not in an interpleader proceeding, but it is said that because it is in an interpleader proceeding there is an appeal by virtue of Order I., rule 2. [The learned judge here read that rule.] It is said that that rule enables the Divisional Court to entertain an appeal from an order of a judge at chambers in interpleader proceedings where the order is as to costs only. To make that out it must be shewn that the proceeding and practice of the Courts of common law before the Judicature Acts was to entertain an appeal from chambers as to costs only in interpleader proceedings. It is said that this is shewn by the decision of the Court of Exchequer in *Teggin* v. *Langford*. (1) No other case was cited in which the Court had entertained an appeal in interpleader proceedings with regard to costs only as between the parties to the suit. It would have been contrary to the practice of the Court as to costs in other matters, and therefore if it existed in interpleader proceedings there would be sure to be found some cases in the books, but no case has been found except that of *Teggin* v. *Langford* (1), and one case alone cannot make a practice. Moreover, that case was not as to costs between the parties, but it was one in which

(1) 10 M. & W. 556.

the Court made the order in the exercise of its jurisdiction over attorneys who are the officers of the Court. The question there did not depend on the proceedings being in an interpleader suit, but whether it was a case for the summary jurisdiction of the Court; and what the Court there had to decide was whether the judge had properly treated the attorney as guilty of malpractice, so that he had rightly ordered him to pay the costs. Then Order I., rule 2, does not in itself entitle this appeal to be made. But even if it did, I think that we ought to construe it, if possible, so that it should not contradict the express provision contained in s. 49 of the Judicature Act, 1873, which is an express enactment that no appeal shall lie from any order as to costs only, and which applies to appeals in all proceedings, including interpleader proceedings. Otherwise what a strange result would take place if there were to be no appeal as to costs in actions where the costs must often amount to a large amount, whilst there should be an appeal as to costs in interpleader proceedings where the costs would generally be very small. It seems to me however that what has been contended for by the appellant cannot be supported. The case of *Hamlyn* v. *Betteley* (1) does not conflict with what we are now deciding. That was with reference to the mode of procedure in carrying out an interpleader order, and there was nothing which was contradictory to such an enactment as exists in the present case.

COTTON, L.J. I am of the same opinion on both points. I will only add that the case of *Dodds* v. *Shepherd* (2) is not in point in favour of the appellant, for it decided that the Judicature Acts and rules did not contradict and repeal the express provision of the Common Law Procedure Act, 1860. Following that I may say here that Order I., rule 2, does not contradict the express provision in s. 49 of the Judicature Act, 1873. I agree however with Brett, L.J., that no practice with regard to appeal as to costs in interpleader proceedings has been shewn to have existed at law.

LINDLEY, J. I am also of the same opinion. If there were any

(1) 6 Q. B. D. 63. (2) 1 Ex. D. 75.

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inconsistency between s. 49 of the Judicature Act, 1873, and Order I., rule 2, the rule must give way to the statute. As to the other point, a judge may sometimes be overwhelmed with the number of summonses before him, and there is nothing unusual in his referring some of them to another judge to assist him in hearing them.

Appeal dismissed.

Solicitors for plaintiff: *Lumley & Lumley.*

W. P.

Nov. 26.

[IN THE COURT OF APPEAL.]

IN RE AN ARBITRATION BETWEEN THE CORPORATION OF DUDLEY AND THE EARL OF DUDLEY'S TRUSTEES.

Local Government Acts—Sewer of Local Authority—Obligation of Landowner to preserve subjacent support for—Compensation for Deprivation of Power to work Mines—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 16, 175, 308.

The Public Health Act, 1875, imposes on landowners, through whose land a sewer is run under that Act, an obligation to preserve to such sewer subjacent support, and gives them a right to immediate compensation for being deprived of free power to work subjacent mines, but not for the risk of percolation of sewage into the subjacent mines.

APPEAL by the Corporation of Dudley from a judgment of the Queen's Bench Division on a special case, stated by an umpire.

This was an arbitration under the Public Health Act, 1875, to determine the amount of compensation to be paid by the corporation of Dudley, being the urban sanitary authority of that borough, to the trustees of the settled estate of the late Earl of Dudley, by reason of the corporation having constructed, or being about to construct, under the authority of the said Act (1) certain sewers and works through, under, or upon certain lands of the trustees.

The umpire (who awarded 1011*l.* as compensation for surface

(1) By s. 15 of this Act, "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

By s. 16 "Any local authority may carry any sewer through, across, or under any turnpike road .... and,

damage to the lands arising from the construction and maintenance of the sewers), found as a fact that the lands contained mines and minerals, and that in consequence of the construction and maintenance of the sewers and the works incidental thereto, the mines and minerals could not be worked and gotten in accordance with the usual and customary method of working without causing the subsidence of the surface, risk of injury to the sewer, and risk of percolation of sewage into the mines. And the umpire considered that there was reasonable ground for apprehending, and he did apprehend, that the mines might by reason of the above matters, be permanently or temporarily damaged, and found as a fact that the value of the mines and minerals was diminished.

It was contended by the corporation, that if and so often as the mines and minerals should be damaged by such percolation of sewage from the sewers, or by any of the works, then the trustees or their successors in title would from time to time be entitled to claim further damages in respect of each several injury as the same should arise against the corporation, and to have any claim in respect thereof referred to arbitration and receive compensation for the same. The umpire decided against

after giving reasonable notice in writing to the owner or occupier .... into, through, or under any lands whatsoever within their district."

By s. 175: "Any local authority may for the purposes and subject to the provisions of this Act, purchase or take on lease .... any lands [which term by s. 4, includes easements], whether situated within or without their district;" and by s. 176, the Lands Clauses Consolidation Acts are incorporated with the Act.

By s. 308, "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of twenty pounds, the same may, at the option of either party be ascertained by and recovered before a Court of summary jurisdiction."

By s. 334, "Nothing in this Act shall be construed to extend to mines of different descriptions so as to interfere with or obstruct the efficient working of the same; nor to the smelting of ores and minerals, nor to the calcining, puddling and rolling of iron and other metals, nor to the conversion of pig iron into wrought iron, so as to obstruct or interfere with any of such processes respectively."

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this contention, but stated this case, in which the questions of law were:

(1.) Whether the corporation were entitled to have the sewers supported by the lands under the same or adjacent thereto, or the trustees were entitled to work the mines and minerals as freely as if the sewers had not been made.

(2.) Whether the corporation would become so entitled by twenty years' user, or the trustees or other owners would be so entitled to work the mines and minerals for all time.

(3.) Whether, in case the sewers should leak in consequence of the working of the mines, and sewage and water should percolate into the mines and damage the same, the trustees would have any cause of action against the corporation for such injury and damage.

And the umpire awarded (in addition to 1011*l.* for surface damage as above stated) 1500*l.* if the Court should be of opinion that compensation was payable for loss of the power to work the mines, and a further 1500*l.* if the Court should be of opinion that compensation was payable for damage by percolation.

Jelf, Q.C., and *A. T. Lawrence*, for the Corporation of Dudley.
Sir F. Herschell, S.G., for Lord Dudley's Trustees.

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DENMAN, J. This case has a curious history. The Solicitor-General, who appears for the trustees, the parties claiming compensation, is dissatisfied with the award on the ground that it was given in his favour, and his dissatisfaction arises from the fact that he receives so little that he contends that it ought to be left open to him to receive none at all at the present time, and to receive a much larger compensation at some future time instead. But I think that this contention ought not to prevail, and that Lord Dudley's trustees were and are entitled to recover now once for all compensation for the damage caused to them. The sewer is placed in the soil of the trustees, and is likely to remain there, at all events for a considerable time. It has not only damaged the surface of the ground in which it is laid, but has diminished the value of the property of the trustees, by throwing upon them, as a necessary consequence of the sewer being where it is, the obliga-

tion to support it. If the trustees should, at any future time, be disposed to work their mines beneath the sewer, they would find themselves hampered in so doing, and if at any time, even to-morrow, they should have to sell their land, they would find it diminished in value by reason of having to support the sewer.

Of the several cases cited none arose upon the Public Health Act, 1875; and I wish to be understood as deciding this case upon the Public Health Act alone. Now, in the first place, the Interpretation Clause, which says that lands are to include easements, has been relied upon as an argument; on the ground that the sewer authorities might purchase an easement, and could be compelled to purchase an easement for which compensation could be given. Then the 13th clause vests the sewers in the local authority, and the 14th clause gives them power to discontinue or alter sewers, and at one time I thought that might afford an argument against present compensation for everything, including the right of support, because it is not certain that for any definite period the sewer will remain in the position in which it is at present. There is also a power given to purchase lands, and to sell lands not required for the purposes of the Act, and if lands are purchased, then the provisions of the Lands Clauses Acts are to be put in force, and disputes as to the amount of compensation payable are to be settled by arbitration. Then comes the clause under which this compensation is sought, and it is found that clause 308, which brings the arbitrators into play, is a clause which is one of several headed "Miscellaneous," and does not particularly refer to any single separate matter. There is power to enter, to make plans of sewers, and so on, given by s. 305, and then comes s. 308, which enacts that where any person sustains damage by reason of the exercise of the powers of this Act, full compensation shall be made to him. In the present case the land is not purchased, but the land is occupied by a sewer, and a sewer is a thing of substance, a heavy thing, requiring a good deal of construction, and a good deal of occupation of ground, and by its very nature requiring such support as arises from the ground underneath not being undermined.

Now the first question which has been raised before us is, does such a state of things as that necessarily imply that the persons

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who have the stratum of soil beneath the surface soil in which the sewer is placed shall be deterred by the very act that the legislature has authorized—viz., keeping a sewer in that place—from undermining it so as to bring down the sewer? It seems to me that it does so, and that there is no case to the contrary at all. *Metropolitan Board of Works* v. *Metropolitan Ry. Co.* (1) is a totally different case, because there the railway was fifteen or sixteen feet from the sewer, parallel to the sewer, and not at all in such a position that it necessarily followed that there should be a right of support from the one towards the other, at the time at which the authority given by the statute should be brought into play. In this case it appears to me a matter of common sense inference, that where a statute for the public benefit gives such a power as this to persons laying down such things as sewers, it must at the same time give them a right not to be undermined by persons having minerals underneath. As for s. 334, which was appealed to as an argument on the other side, and which says that nothing shall be construed to extend to mines so as to interfere with or to obstruct the efficient working of the mine, I am pretty clearly of opinion that that does not extend to such a case as this, but must be read to mean mines which are working at the time at which the sewer is laid down, and not possible future mines. What I take the section to mean is, that a sewer must not be laid down, and that works must not be done, so as to interfere with any existing mines. Then, if there be a right to support, it seems to me that the other contentions of the sewer authorities fail, because, looking at the words of this section, you must apply them to the thing to be done, and the thing to be done is the laying down of the sewer, and no other time can be suggested at which a fresh right shall arise. It would be entirely optional on the part of the mine owner when he should begin to work his mines, and it cannot be said that a fresh right would arise because at any time he could give notice that he was about to work his mine. The damage therefore must occur at the time at which the sewer is laid down. That, I think, is the intention of the statute so far as we can gather it from the words.

That being so, I think that the case stated by the arbitrator

(1) Law Rep. 4 C. P. 192.

must be decided accordingly, and I think that the result is that the finding of 3000*l.* is the finding that will stand.

WILLIAMS, J. I am of the same opinion. It seems to me that upon the main question of law upon the award two questions arise. In the first place, did the owners of the sewer acquire a right to support by virtue of the Act of Parliament when the sewer was constructed; and, secondly, if they did acquire a right to support, was the arbitrator right in including in the amount of compensation the sum that he has stated in the award? It appears to me clear beyond a doubt that the owners of the sewer did acquire the right to support from the land on which it was constructed under the Act of Parliament, and, further, that the owners of the land sustained damages by the diminution in the value of the land by reason of the support that they were bound to give to the portion which is placed in their land. It seems to me that the arbitrator has included nothing more in the sum of 3000*l.* than was legitimate in arriving at the amount of compensation to be given for that damage. That in no way affects the question whether, if any fresh acts are done by the owners of the sewer by virtue of the Act of Parliament, further compensation may be awarded. According to my view the damage which the owners of the land here claim compensation for was damage which accrues to them immediately on the construction of the sewer.

The Corporation of Dudley appealed.

Nov. 25. *Jelf, Q.C.*, and *A. T. Lawrence*, for the corporation of Dudley. The Public Health Act gives no express right to support for a sewer constructed under that Act, and no such right can be implied. The scheme of the Act is that the local authorities may purchase the easement of support from time to time as they see fit, and that they may if they please run the risk of having the support withdrawn, or even alter the course of a sewer altogether. The compensation clauses of the Public Health Act, 1875, merely repeat those of the Public Health Act, 1848, so that they have now been in force for upwards of thirty years, and yet no such claim as the present has ever been made. The Act ought to be construed against the local authorities with the

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same strictness as a private Act of Parliament is construed against the promoters. There is no right to lateral support for a sewer under the Metropolitan Sewer Acts: *Metropolitan Board of Works* v. *Metropolitan Ry. Co.* (1), and there is no distinction in principle between a right to lateral and a right to subjacent support, the only difference between the two being that the obligation to preserve the support may be cast on different owners in the two cases. The 334th section of the Act, which contains the saving for mines, shews that no compensation can be awarded for in effect obstructing the working of mines in contravention of that section.

[They also cited *Dunn* v. *Birmingham Canal Navigation Co.* (2); *Whitehouse* v. *Wolverhampton and Walsall Ry. Co.* (3); *Roderick* v. *Aston Local Board* (4); *Metropolitan Board of Works* v. *North London Ry. Co.* (5); *Caledonian Ry. Co.* v. *Sprot.* (6)]

Sir F. Herschell, S.G., and *Anstie*, for Lord Dudley's trustees, submitted to the judgment of the Court, admitting that they did not desire a judgment in their favour on the question of right to support. (7)

Jelf, Q.C., in reply.

Nov. 26. BRETT, L.J. The parties have left it to us to say, without regard to the strict form in which the questions are put in the special case (8), what are their legal rights. The matters in respect of which the trustees of Lord Dudley may be said to claim compensation are two:—First, in respect of the burden put on them, by the fact of a sewer authorized by the Public Health Act being run through their land, to support that sewer, or rather, so to deal with their land as not to take away support from it; and, secondly, in respect of the risk of percolation from the sewer into their land. To the first of these claims the local authority reply that the statute gives them no right to support for the sewer, and the trustees no compensation for failing to

(1) Law Rep. 4 C. P. 192.
(2) Law Rep. 8 Q. B. 42.
(3) Law Rep. 5 Ex. 6.
(4) 5 Ch. D. 328.
(5) Johns. 405; 28 L. J. (Ch.) 909.
(6) 2 Macq. 449.
(7) See the first paragraph of the judgment of Denman, J., ante, p. 88.
(8) The meaning of the award had been also a matter of argument.

support it; and to the second, that percolation, if there be a right to support, could only arise from a wrongful act of the trustees disentitling them to compensation.

As to the first point, it is admitted that the statute gives no express right to support for a sewer, but it is said that such a right must be implied, so that the Court may take it as read into the Act. The general rule on this head of law is, that where the legislature gives power to a public body to do anything of a public character, the legislature means also to give to the public body all rights, without which the power would become wholly unavailable, although such a meaning cannot be implied in relation to circumstances arising accidentally only. The question here arises in respect of a sewer to be put on or into land. There appears to be more than a power so to construct the sewer, there is even an obligation so to construct it. By s. 299 of the statute the Local Government Board may insist on a local authority providing their district with sufficient sewers, and by s. 16, any local authority may carry any sewer after reasonable notice in writing to the owner or occupier into, through, or under any lands whatsoever within their district. Further, by s. 15 there is an obligation cast upon every local authority to keep in repair all sewers belonging to them. It is said, therefore, that there is a necessary implication that all the persons, on whose land or next to whose land a sewer is constructed, must so use his land as not to let the sewer down. Now if all subjacent support may be taken away, the sewer must inevitably fall. But it is impossible to conceive that the legislature can have given the local authority a power as against landowners to make sewers, and an obligation in favour of landowners to repair them, without at the same time giving the right to support. Without such right the power to construct sewers would be illusive, ridiculous, and wholly inoperative. As to the amount of support given, I do not think it can be represented by a mathematical line drawn from the base of the sewer. The legislature must be taken to have dealt with the matter substantially, not mathematically, so that it may be that some space wider than the width of the sewer may be required. The support is given to such an extent as practical men having experience in such matters would deem to

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be required under the term subjacent support. The difficulty of deciding what the term includes is an argumentative not a practical difficulty. Practically only the owner through whose land the sewer is run will be bound to give the support.

I incline to the opinion that what is known by "lateral support" is not to be implied, but that it is a question which it is not necessary to decide in this case.

The implication of the right to subjacent support is, therefore, to be found in the statute, unless there can also be found express words to exclude it. We are referred for such express words to s. 175, which gives power to purchase lands, including, by s. 4, easements, and amongst them the easement of support. This is true, but the possibility of a non-user of the power is not excluded, and there is no obligation upon the local authority to buy land or easements. On the other hand full compensation is expressly given by s. 308, to any person sustaining damage by reason of the exercise of any of the powers of the Act, although his lands are not purchased. The legislature has not been so unjust as to fix a burden on owners without giving corresponding compensation, either by purchase of land by agreement, or by payment of a sum of money.

Then it is argued that the compensation ought to be delayed till the working of the mines actually began. But if compensation be claimed at all, it must be for prospective as well as actual injury, and everything which will happen must be taken into consideration at once. In the case of ordinary land, the prospective injury is little or none, but in the case of building land, if there be a prospect of the power of building being hampered—as might happen in the case of cellars or underground works—a pecuniary burden is thrown upon the owner, and he becomes entitled to corresponding pecuniary compensation; and so here in the case of mining land, where we have an actual burden cast upon the owner, and a tangible injury arising from the inability to work his mines, a corresponding claim to compensation manifestly arises.

The subsidiary question as to right of compensation for risk of injury by percolation is not one of principle, but arises out of the accidental circumstances of this case. On this question, I

think that it follows, from the obligation to support the sewer being thrown upon the trustees, that there could be no percolation for which they could claim either compensation under the statute, or damages by action; for any percolation could only be caused by wrongful workings of their own.

I do not see that our decision here is in any way inconsistent with *Metropolitan Board of Works* v. *Metropolitan Ry. Co.* (1) The distinction between that case and this is that in that case the Court declined to draw the inference which we draw here, because there was no such compensating clause in the Act of Parliament (11 & 12 Vict. c. 112) under which the sewer was constructed, as there is in this Public Health Act.

COTTON, L.J. I think that the legislature, in requiring the local authority to make and maintain sewers, by necessary implication confers upon them that right of support which under ordinary circumstances is necessary. It is impossible to suppose that the duty to maintain the sewers was imposed without the local authority being able to prevent a landowner from rendering them useless. I think that the landowner has the obligation imposed upon him to leave sufficient earth to support the additional burden, if any, which the sewer may cause, on the ground that the right of property in any particular stratum carries with it the right to support by subjacent strata. The sections which which have been cited from the Public Health Act do not rebut this presumption. From s. 26, which prohibits the imposition of a surface weight only, it has been argued that the detraction of subjacent support is allowed. But I think that that section only adds a summary remedy. Then from s. 334, which provides that nothing in the Act shall be construed to extend to mines, it is argued that mines near a sewer may be worked in any way whatever, but the latter part of that section which protects the "smelting of ores and minerals," &c., shews that the section is confined in its operation to those clauses of the Act which deal with the prevention of nuisances.

We were much pressed with the argument that if subjacent support is to be implied, lateral support must be implied also;

(1) Law Rep. 4 C. P. 192.

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but I do not think that any question of lateral support arises here. I do not say, however, that the support is to be confined to land lying exactly beneath the sewer. Before the sewer was run through his land, the owner was absolute owner of the whole soil, and could take away as much as he pleased, and let down as much as he pleased, but as soon as the sewer was run through his land, he lost that right. He is therefore entitled to compensation for the loss of these lower strata, the loss being a damage caused by an exercise of the powers of the Act. With regard to lateral support and compensation for loss of adjacent strata, it may be that the support is given without the corresponding right to compensation, or it may be that the difficulty may be solved by an exercise of the power to buy land or to buy an easement, but it is a difficulty which does not arise in the present case.

I have nothing to add as regards the case of *Metropolitan Board of Works* v. *Metropolitan Ry. Co.* (1) As to *Metropolitan Board of Works* v. *North London Ry. Co.* (2), that case only comes to this, that a sewer authority is not bound, as railway and other companies are, before entering upon land, either to purchase it or give a bond for the purchase-money.

I also agree that there can be no compensation for risk of percolation, which could only arise from unlawful working.

LINDLEY, L.J. I am of the same opinion. Primâ facie the local authority acquire a right to support for the sewers, but it is put ingeniously in argument that they may acquire the right from time to time as they may have occasion for it, and that inasmuch as in ninety-nine cases out of a hundred they would not require support, the legislature has left them, in the original construction of the sewers, to run the risk of not being able to purchase it in time. I think, however, that the right to support accrues at the very moment that the sewer is constructed. This follows from the necessity of the case, and *Metropolitan Board of Works* v. *Metropolitan Ry. Co.* (1) is no authority to the contrary.

Rather a difficult question arises on s. 334. It is put that that section authorizes the uncontrolled working of mines, and no doubt the first part of the section logically goes that length, and

(1) Law Rep. 4 C. P. 192. (2) John. 405; 28 L. J. (Ch.) 909.

even further, for logically it prohibits the taking of mines by purchase, but when the second part of the section is considered, it is clear that the whole section applies to nuisances only.

BRETT, L.J. I take the same view of s. 334.

Appeal dismissed.

Solicitor for Corporation of Dudley: *G. S. Warmington, for E. M. Warmington, Dudley.*

Solicitors for Lord Dudley's Trustees: *Benbow, Saltwell, & Tryon.*

J. E. H.

THE BANBURY URBAN SANITARY AUTHORITY, APPELLANTS; PAGE, RESPONDENT. *Dec.* 19.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 47 —*Nuisance by keeping Swine—Absence of Injury to Health.*

It is an offence under the Public Health Act, 1875, s. 47, to keep swine so as to be a "nuisance" in the common law meaning of the term. It is not necessary to such offence that there should be any injury to health.

CASE stated by justices, the facts of which were in substance as follows:—

An information had been laid against the respondent by the appellants under the 47th section of the Public Health Act, 1875, (38 & 39 Vict. c. 55), for keeping swine so as to be a nuisance to a certain person who resided near the premises where they were kept. At the hearing before the magistrates, evidence was adduced shewing that the swine were kept by the respondent so as to produce extremely offensive effluvia and substantial annoyance to the said person and his household, but it was not proved that any injury to health was likely to result. The magistrates in the absence of proof that the nuisance was injurious to health refused to convict, and dismissed the information.

The question for the Court was, whether it was necessary for the appellants to prove as part of their case not only that a

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nuisance was caused in the ordinary sense of the word, but also that such nuisance was injurious to health.

Jelf, Q.C. (*Glen*, with him), for the appellants, contended that the word "nuisance" in the section included anything that would be a nuisance at common law. He cited *Great Western Ry. Co.* v. *Bishop* (1); *Malton Board of Health* v. *Malton Manure Co.* (2)

The respondent did not appear.

GROVE, J. This section contains a specific provision against keeping swine in a dwelling-house or so as to be a nuisance to any person. There is nothing said about injury to health. In some of the other sections of the Act nuisances injurious to health are dealt with, and in the case of such nuisances the certificate of medical men is required before proceedings are taken. There is nothing of the sort in this section. It appears to me that the word "nuisance" here is used in the ordinary legal sense, and includes, in addition to matters injurious to health, matters substantially offensive to the senses. The decision of the justices must be reversed, and the case remitted to them.

LOPES and BOWEN, JJ., concurred.

Case remitted to the magistrates.

Solicitors for appellants: *Mackeson & Co., for Kilby & Mace.*

(1) Law Rep. 7 Q. B. 550. (2) 4 Ex. D. 302.

E. L.

THE GUARDIANS OF THE POOR OF THE SUNDERLAND UNION, APPELLANTS; THE CLERK OF THE PEACE FOR THE COUNTY OF SUSSEX, RESPONDENT. 1881 *Dec.* 19.

Poor Law—Settlement by Residence—Parish—Union—39 & 40 *Vict.* c. 61, s. 34.

A person resided in parish A. for a term of three years which expired before the passing of 39 & 40 Vict. c. 61, in such manner and under such circumstances in each of such years as would render him irremoveable. He then left parish A. and went to reside in parish B. in the same union, from which he continued irremoveable down to a date subsequent to the passing of the said Act:—

Held, that he had not acquired a settlement in parish A. under 39 & 40 Vict. c. 61, s. 34.

SPECIAL CASE stated under 12 & 13 Vict. c. 45, on appeal to the quarter sessions for the county of Sussex against an order of justices, adjudging the settlement of one Philip King to be in the parish of Sunderland in the Sunderland Union.

The facts were in substance as follows:—

The order was based upon the birth settlement of the said Philip King, and it was agreed that the order was to be confirmed unless it could be shewn that he was settled elsewhere.

On or about the 1st of July, 1864, the said Philip King went to reside in the township of Stockton-upon-Tees in the Stockton Union, and continued to reside in such township during the term of three years and more, namely, until the month of July, 1870, in such manner and under such circumstances in each of such years as in accordance with the several statutes in that behalf would have rendered him irremoveable.

In the month of July, 1870, the said Philip King ceased to reside in the said township of Stockton-upon-Tees and immediately thereupon went to reside in the township of Middlesborough which then formed part of the said Stockton Union. He resided there continuously till December, 1872, when he enlisted in the army. Seven days, or thereabouts, after so enlisting he bought his discharge from the army and immediately returned to Middlesborough and resided there continuously till March, 1873, when he again enlisted and served in the army till July, 1878.

In the month of July, 1878, he was discharged from the army

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and immediately thereupon went to reside in the township of Stockton-upon-Tees and there resided continuously till the month of November, 1878, when he again enlisted in the army, in which he served till the 1st of July, 1880. On that day he was found guilty of certain offences by a court martial at Shorncliffe Camp, and sentenced to be imprisoned for 336 days, and to be discharged from the service. While undergoing his sentence in Lewes Gaol he was certified to be insane, and was removed, in pursuance of a warrant from the Secretary of State, to the lunatic asylum at Hayward's Heath, in the county of Sussex, where he was still confined.

By an order of the Local Government Board, dated the 1st of June, 1875, the township of Middlesborough was separated from the Stockton Union, and together with certain other parishes formed into a separate union under the name of the Middlesborough Union.

The question for the Court was, whether the said Philip King was settled in the township of Stockton-upon-Tees by reason of his residence there or not.

Glen, for the appellants. The lunatic has acquired a settlement by residence in the township of Stockton under 39 & 40 Vict. c. 61, s. 34. He resided for more than three years in such township, and although his residence in Stockton was broken before the passing of the Act the case is not governed by the decision in *Reg.* v. *Guardians of Ipswich* (1) because his status of irremoveability continued until after the passing of the Act, inasmuch as the period during which he was serving in the army does not count (see *Reg.* v. *Hartfield* (2)), and, the township of Middlesborough being in the Stockton Union, residence in Middlesborough was for the purpose of irremoveability the same as residence in Stockton: 24 & 25 Vict. c. 55, s. 1. The ground of the decision as stated in *Reg.* v. *Guardians of Ipswich* (1) was that the status of irremoveability had ceased to exist before the passing of the Act. This case is governed by the decision in *Reg.* v. *Guardians of Brampton.* (3) It was there held that,

(1) 2 Q. B. D. 269. (2) 21 L. J. (M.C.) 65.
(3) 3 Q. B. D. 479.

where a person had completed the period of residence required by s. 34 before the passing of the Act but continued to reside in the union in receipt of relief till the passing of the Act, he acquired a settlement because the status of irremoveability continued. The case of *Guardians of Plomesgate* v. *Guardians of West Ham* (1) is distinguishable from the present case. In that case it was sought to put together periods of residence in different parishes to make up the requisite period of three years, and the Court held that that could not be done because there was no such thing as union settlement; but settlement under 39 & 40 Vict. c. 61, s. 34, was parochial as under previous statutes. Here, there was three years' residence in the township of Stockton, and what is sought to be established is not a union settlement but a parochial settlement in the township of Stockton. The decision in *Reg.* v. *Guardians of Ipswich* (2) is inconsistent with the view taken by the Court in *Westbury-on-Severn* v. *Barrow-in-Furness* (3) and cannot be considered as a binding authority. It is contended that the 34th section must be construed as having a retrospective effect, and therefore the lunatic acquired a settlement by reason of his three years' residence in the township of Stockton before the passing of 39 & 40 Vict. c. 61.

Poland, for the respondent. This case is governed by the decision in *Reg.* v. *Guardians of Ipswich.* (2) It is quite clear that that decision would have applied if the pauper instead of removing to a parish in the same union had gone to a parish in a different union. The fact that the parish to which he went was in the same union preserved his status of irremoveability by virtue of 24 & 25 Vict. c. 55, s. 1, but that is immaterial for the purposes of settlement. The decision in *Guardians of Plomesgate* v. *Guardians of West Ham* (1) is conclusive to shew that it is not permissible to add the residence in one parish to the residence in another parish in the same union for the purposes of a settlement, which is what the appellants really seek to do here. The present point was not raised in the case of *Reg.* v. *Brampton Union.* (4) The Court there assumed that the residence was all in the same parish, the special case not stating the contrary. The case of

(1) 6 Q. B. D. 576.
(2) 2 Q B. D. 269.
(3) 3 Ex. D. 88.
(4) 3 Q. B. D. 479.

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Westbury-on-Severn v. *Barrow-in-Furness* (1) has no application to the present case. It turned on the language of the 35th section, and the Court expressly said that they did not question the judgment in *Reg.* v. *Guardians of Ipswich.* (2)

[He also cited *Reg.* v. *Abergavenny Union.* (3)]

Glen, in reply.

GROVE, J. It appears to me that this case is concluded by the decisions in the cases of *Reg.* v. *Guardians of Ipswich* (2) and *Guardians of Plomesgate* v. *Guardians of West Ham* (4) taken together. The question is whether by reason of the provisions of the 34th section of 39 & 40 Vict. c. 61, the lunatic having resided for the period of three years in the township of Stockton previously to the passing of the Act, and having continued to reside in the same union, though not in the same parish, after the passing of the Act, he not only retained his status of irremoveability, but acquired a settlement in the parish of Stockton. Now, the case of *Reg.* v. *Guardians of Ipswich* (2) decides that a person who has resided in a parish for three years, but whose residence there has ceased before the passing of the Act, does not acquire a settlement under the 34th section. That case would not be conclusive, if residence in any parish of the union would be sufficient to keep up the residence, not only for the purpose of preserving the status of irremoveability, but also for the purpose of giving the settlement. But the case of *Guardians of Plomesgate* v. *Guardians of West Ham* (4) decides that, though residence in another parish in the same union is sufficient for the purpose of preserving the status of irremoveability, it is not sufficient for the purpose of acquiring a settlement. It was argued that, because by the provisions of 24 & 25 Vict. c. 55, s. 1, residence in two parishes of the same union is for the purpose of irremoveability the same as residence in one parish, therefore, where the residence of three years before the Act is continued in another parish in the same union, the case must be treated for the purpose of settlement as if there had been no break in the residence. That contention seems to me to be

(1) 3 Ex. D. 88.
(2) 2 Q. B. D. 269.
(3) 6 Q. B. D. 31.
(4) 6 Q. B. D. 576.

inconsistent with the decision in the case of *Guardians of Plomesgate* v. *Guardians of West Ham.* (1) It was very ingeniously argued that the Court could not have meant in the case of *Reg.* v. *Guardians of Ipswich* (2) to hold that the settlement was not obtained by a residence ending before the passing of the Act when the status of irremoveability continued. But, as the case of *Guardians of Plomesgate* v. *Guardians of West Ham* (1) has decided that the residence for the purpose of settlement must be in the same parish, we cannot decide in the appellants' favour without really overruling the case of *Reg.* v. *Guardians of Ipswich.* (2) For these reasons I think our judgment must be for the respondent.

BOWEN, J. I am of the same opinion. The decision in the *Guardians of Plomesgate* v. *Guardians of West Ham* (1) is binding upon us, and the case appears to me to have been correctly decided. The enactment of the 1st section of 24 & 25 Vict. c. 55, to the effect that residence in any part of the union shall have the same effect as continued residence in the same parish, has reference only to the provisions of the particular section dealing with irremoveability. It appears to me that putting the cases of *Reg.* v. *Guardians of Ipswich* (2) and *Guardians of Plomesgate* v. *Guardians of West Ham* (1) together the argument for the appellant must fail. It was argued that the case of *Reg.* v. *Guardians of Ipswich* (2) was not conclusive as to the effect of the 34th section of 39 & 40 Vict. c. 61, in a case such as this where there was only a break of residence in the parish, but the status of irremoveability still continued. This contention turns on a minute criticism of the language used by Cockburn, C.J., and Mellor, J., in that case. It is true that they point out in their judgments that the argument for the respondent in that case would involve the result that there would be a settlement although the status of irremoveability had been long since destroyed. That observation was, no doubt, well founded with reference to the construction of the section in that case, but it must be remembered that the 34th section of 39 & 40 Vict. c. 61, is an enactment dealing, not with irremoveability, but with settlement. It appears to me that to say that

(1) 6 Q. B. D. 576. (2) 2 Q. B. D. 269.

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the decision in the case of *Reg.* v. *Guardians of Ipswich* (1) is not to apply where there has been a cessation of the residence in the parish before the Act, because the status of irremoveability continues, is to forget that the section applies to the acquisition of a settlement and not to the status of irremoveability.

For these reasons I think our judgment must be for the respondent.

Judgment for the respondent.

Solicitors for appellants: *Shum, Crossman, & Co., for Kidson, Son, & McKenzie.*

Solicitor for respondent: *Solicitor to the Treasury.*

E. L.

Nov. 28.

KING *v.* SPURR.

Negligence—Liability of Proprietor of Cab for Negligence of Driver—Horse provided by Driver—Metropolitan Hackney Carriages Acts (1 *&* 2 *Wm.* 4, *c.* 22), *ss.* 6, 20, 23—6 *&* 7 *Vict. c.* 86, *ss.* 10, 21, 24, 28, 35.

The plaintiff's cart and pony were injured by a cab plying in the streets of London, owing to the negligence of the cab-driver. The defendant was proprietor of the cab and licensed to ply it for hire. He had let the cab to the driver for a weekly payment, the horse, harness, and whip being provided by the driver with whom the defendant had nothing to do beyond receiving money from him:—

Held, that under the circumstances there was nothing in the Metropolitan Hackney Carriage Acts (1 & 2 Wm. 4, c. 22, and 6 & 7 Vict. c. 86), to make the defendant liable for the negligence of the driver.

Powles v. *Hider* (6 E. & B. 207), and *Venables* v. *Smith* (2 Q. B. D. 279) considered.

APPEAL by motion for a new trial from the decision of the deputy judge of the County Court for Surrey.

The action was to recover damages for injury to the plaintiff's pony and cart in Camberwell, through the negligent driving of a cab belonging to the defendant. It appeared that the defendant, who was a cab proprietor at Blackfriars Road, was the licensed owner of the cab, which was let on hire to Manock, the driver, for a weekly payment of 10*s.* The horse, harness, and whip did not belong to the defendant, but were provided by Manock, and the

(1) 2 Q. B. D. 269.

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defendant had nothing to do with Manock beyond receiving the weekly payment from him.

The judge nonsuited the plaintiff, on the ground that there was nothing to shew that Manock was the defendant's servant. A rule to shew cause why there should not be a new trial on the ground of misdirection was granted by this Court.

Nov. 7, 8. *Lamaison*, for the defendant, appeared to shew cause, but was stopped.

Macrae, in support of the rule. Admitting that at common law the relation of master and servant did not exist between the cab-driver and the defendant; the cases of *Powles* v. *Hider* (1), and *Venables* v. *Smith* (2), must be taken to have decided that the statutes relating to hackney carriages make the proprietor responsible for the acts of the driver, for the obvious reason that the drivers are not in a position to pay damages. The enactments upon which those cases proceeded are, 1 & 2 Wm. 4, c. 22, ss. 6, 20; and 6 & 7 Vict. c. 86, ss. 9, 10, 21, 24, 28, and 35. In *Fowler* v. *Lock* (3), the responsibility of cab proprietors as above stated is not disputed. Their responsibility in summary proceedings under 6 & 7 Vict. c. 86, s. 28, could not be avoided by a defence like the present. It is as owner of the cab, and not of the horse drawing it, that the proprietor is placed under the control of the Acts.

Lamaison, for the defendant, referred to 16 & 17 Vict. c. 33, s. 1; and 32 & 33 Vict. c. 115, s. 8.

Cur. adv. vult.

Nov. 28. GROVE, J. This was a rule calling on the defendant to shew cause why there should not be a new trial, in an action tried before the deputy judge of the County Court for Surrey, who nonsuited the plaintiff.

The case was argued before me and my Brother Bowen, and we took time to consider our decision. It has presented considerable difficulty, a difficulty which we should not have experienced if no similar case had previously arisen, but which has been caused by two reported cases, *Powles* v. *Hider* (1), and *Venables*

(1) 6 E. & B. 207. (2) 2 Q. B. D. 279.
(3) Law Rep. 7 C. P. 272.

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Grove, J.

v. *Smith.* (1) The facts in the present case were as follows:— [The learned judge referred to the evidence, the effect of which has been already stated, and continued,] We gather from these facts that there was nothing, apart from the statutes relating to hackney carriages, to make the driver the servant of the proprietor; and it remained for us to consider these Acts, and to say whether the legislature must be taken to have created the relation of master and servant between cab proprietors and drivers. After considerable hesitation, we have come to the conclusion that we are unable to say that the county court judge was wrong. If we consider the position of the parties without reference to any Act of Parliament, it appears undoubtedly to be that of bailor and bailee, and not of master and servant, for the defendant had nothing to do with the driver beyond receiving a weekly payment from him, and it was impossible for the defendant to exercise any control of a master over the driver. But the plaintiff's counsel argued that since *Powles* v. *Hider* (2), and *Venables* v. *Smith* (1), it must be taken to be established law that the relation of master and servant existed between a cab proprietor and the driver, and if the facts in those cases were the same as in the present one we should be bound to follow them. But there is a very significant distinction. In *Powles* v. *Hider* (2), both cab and horses belonged to the proprietor, and the cabman paid so much a day for the use of them, and this circumstance is referred to by Lord Campbell in his judgment. There is a great difference between this and the case where a man hires only the cab and provides the horses himself. The difficulty is really not in the facts of *Powles* v. *Hider* (2), but in the language used by the judges. Lord Campbell in his judgment says that, if the defendant's argument that the driver must be considered as the bailee of the cab and horses were right, the driver could not render the defendant liable on any contract into which he entered for the use of the cab, and proceeds, "But looking to the position of the proprietor, and the driver of a cab, under the circumstances proved, and to the Acts of Parliament which regulate their respective duties, we are of opinion that the driver is to be considered the servant or agent of the proprietor, with authority to

(1) 2 Q. B. D. 279. (2) 6 E. & B. 207.

enter into contracts for the employment of the cab on which the proprietor is liable. There can be no doubt that this would be so, if the drivers were engaged at fixed wages, accounting to the proprietor for all the earnings of the cab. But must not the actual arrangement between them be equally considered a mode by which the proprietor receives what may be estimated as the average earnings of the cab, minus a reasonable compensation to the driver for his labour?" If the judgment had stopped there, it would not have affected the present case, but Lord Campbell further on says, "The Acts of Parliament referred to always regard the proprietor and driver of the hackney cab as employer and employed, or master and servant, and clearly contemplate that the party who engages the cab under the care of the driver, shall have a remedy against the proprietor."

We do not take so wide a view of the operation of these Acts as Lord Campbell does, and the part of his judgment which holds that the proprietor must be taken to receive the earnings of the cab, suggests that he was applying to the case the common law relation of the parties. Here the facts do not admit any contention that at common law the relation of master and servant existed, and I doubt whether the Court in *Powles* v. *Hider* (1) would have decided as they did if they had had before them as a fact that the cab-driver was not in the service of the proprietor. The provisions of 6 & 7 Vict. c. 86, s. 21, which require the proprietor to retain in his possession the driver's licence; s. 28 which makes him liable for fines or damages payable by the drivers; and s. 35 which requires him to produce the driver in case of complaint, are consistent with the non-existence of the relation of master and servant. The liability under s. 28 to pay compensation not exceeding 10*l.*, may be used as an argument on either side. If the Metropolitan Hackney Carriage Acts intended in all cases to make the proprietor responsible for the driver, as a master for his servant, this could have been done in a sentence, and an enactment making him liable in summary proceedings would have been differently worded and have only fixed the limit. *Venables* v. *Smith* (2) throws no additional light upon the question, for it proceeded entirely upon *Powles* v. *Hider*. (1)

(1) 6 E. & B. 207. (2) 2 Q. B. D. 279.

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I will now read the judgment of my Brother Bowen who is unable to be present.

BOWEN, J. Owing to an unexpected duty which has called me this morning to another Court, I am unable, as I had intended, to be present during the delivery of my Brother Grove's judgment, and to supplement it by an oral judgment of my own. I can only add a few words to explain generally the grounds on which I concur in his decision.

Putting statutes aside, the relation in this case of the proprietor and driver of the cab would be simply that of bailor and bailee. Ought we to say that the learned judge below is wrong in holding such still to be their true relation, the Act of Parliament notwithstanding? Only—so it seems to me—if as a matter of law, the Act of Parliament of necessity and under all circumstances, has created between proprietor and driver the relation of master and servant.

Has the Act of Parliament done so in express terms? No. Has it done so by necessary implication? To hold this would be to read a new section into, and engraft it upon, the Act. It is true that the Act of Parliament uses in several places the terms "service" and "employment," but it uses them, I think, as sufficiently descriptive, for the purposes only of the construction of the Act, of the relation of the two persons, and not with the object of enacting that, for all purposes outside the Act, such is to be always their relation. And, indeed, in many cases the effect of the Act, taken in connection with the circumstances, is in my opinion to bring about this very relation. I go further. I think that there is a primâ facie presumption that such is their relation, in consequence of the respective positions in which the Act of Parliament has placed the proprietor on the one hand, and the driver on the other.

But to say that in all circumstances the Act of Parliament as a matter of law necessarily creates such a relation, is to go, in my opinion, too far, and to make Acts of Parliament, not to interpret them. The embarrassment I have felt arises really from the previous decisions of this Court, in which (though not strictly obliged to do so as a basis for their decisions), Lord Campbell and

Cockburn, C.J., do in my opinion, employ language which puts forward this proposition in its extreme form. It does not, perhaps, follow that they would have used expressions so wide, had the case before them been such as to suggest the expediency of laying down the principle in a less broad shape. The judgment in both cases can be supported by adopting the view which I have above expressed of the true effect of the Act of Parliament, and upon consideration I think that we are not disregarding their judgments, but only qualifying the expressions with which they have accompanied their judgments, in holding that in the present instance the county court judge was reasonably entitled to come to the decision at which he has arrived.

Rule discharged.

Solicitor for plaintiff: *J. W. Few.*
Solicitor for defendant: *Crafter.*

A. P. S.

WALKER *v.* MATTHEWS.

Nov. 16.

Sale of Goods—Felony—Sale of stolen Beasts in Market overt—Conviction of Thief—Restitution—Claim by Purchaser against Owner for costs of keeping the Beasts.

The bonâ fide purchaser of stolen beasts sold in market overt, cannot, in answer to a claim for them by the original owner after the conviction of the thief, counter-claim for the cost of their keep while the beasts were in the possession of the purchaser, for they were his own property until, on the conviction, the property revested in the original owner.

APPEAL from the Huntingdon County Court.

The plaintiff sued for the delivery of two cows and two calves belonging to him, valued at 45*l.*, and for special damages caused by their detention.

The defendant counterclaimed in respect of the keep of the cows and calves during the time they had been in his possession, and also for money paid and expenses incurred in respect of them respectively, 15*l.* 19*s.*, after allowing for the value of the milk of the cows.

At the trial before the county court judge and a jury, it

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appeared that on the 7th of June, 1880, the two cows, then in calf, were stolen from the plaintiff's field. On the 11th of June, the thief having driven them thirty miles, sold them in market overt to a cattle dealer, who on the 16th of June sold them to the defendant, a bonâ fide purchaser for value and without notice of the felony. On the 21st of June, the plaintiff having traced the cows, demanded them of the defendant who refused to give them up. They calved while in his possession, and were also ill of foot and mouth disease for a time. On the 5th of April, 1881, the thief was convicted of stealing the cows, and on the 9th of April notice of the conviction was given to the defendant, and the cows and calves were demanded of him on behalf of the plaintiff. The plaintiff established his right to the beasts, and objected that the defendant could not in law recover for the keep of them. The judge overruled the objection. The jury found a verdict for the plaintiff on the claim, and for the defendant 15*l.* 19*s.* on the counter-claim, and judgment to that amount on the counter-claim was given for the defendant.

A rule having been obtained calling on the defendant to shew cause why judgment for the plaintiff on the counter-claim should not be entered,

Cockerell, shewed cause. On conviction of the thief, the property revested in the plaintiff, 24 & 25 Vict. c. 96, s. 100; and it is admitted that he could recover the animals, and even the value of the milk: *Scattergood* v. *Sylvester*. (1) Credit has therefore been given for the value of the milk yielded by the cows while in possession of the defendant. But he is entitled to be repaid for the cost of their keep, at least up to the conviction and demand. Until the conviction the property was in him, and he might have sold the beasts, instead of doing so he took care of them, and kept them during a time in which they were ill, and therefore unremunerative.

[LOPES, J. He was keeping his own property, and cannot, in the absence of any contract with the plaintiff, claim from him the costs of keep.]

It must be conceded then that his position is even worse as

(1) 15 Q. B. 506; 19 L. J. (N.S.) (Q.B.) 447.

regards the expense of keeping them after the conviction and demand, when the property revested and the detention became wrongful.

W. Garth, in support of the rule, was not heard.

GROVE, J. The judgment for the counter-claim was wrong in law, and the appeal must be allowed.

LOPES, J., concurred.

Rule absolute.

Solicitors for plaintiff: *Le Riche & Son.*

Solicitors for defendant: *Wallingford, Day, & Son.*

J. R.

SHARPE *v.* BIRCH; SIMPSON, CLAIMANT.

Nov. 15.

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10—*Registration—Affidavit of due "Attestation" of Bill of Sale.*

The affidavit "of its due execution and attestation" filed with a registered bill of sale under 41 & 42 Vict. c. 31, s. 10, sub-s. 2, must state, inter alia, that the bill of sale was "duly attested" by the attesting solicitor, i.e. that he was present and witnessed the due execution, an affidavit merely verifying his signature to the attestation clause, and describing his residence and occupation, is defective, and will therefore invalidate the registration.

INTERPLEADER referred by Hawkins, J., from chambers to the Court.

Goods seized in execution, on a judgment obtained by the plaintiff against the defendant, were claimed under a bill of sale previously given to the claimant by the defendant.

The bill of sale was dated the 6th of September, 1881, and was duly executed by the grantor, and purported to be duly attested, according to 41 & 42 Vict. c. 31, s. 10, sub-s. 1. by William F. Law, solicitor, whose name was subscribed to a regular attestation clause. The bill of sale was, within seven days, registered, and a copy was filed, together with an affidavit of a solicitor's clerk, in which, after verifying the copy and the time of the making of the bill of sale, he said that he was present and saw the grantor sign and execute it on the 6th of September, in the year aforesaid, the

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effect of the said bill of sale having been first explained to him, and the deponent described the residence and occupation of the grantor, and further said, "That the name 'William F. Law' set and subscribed as the witness attesting the due execution thereof is of the proper handwriting of William Farmery Law, and that he resides at No. 3, Saint Mary's Place, Stamford, aforesaid, and is a solicitor."

Lindsell, for the claimant. The bill of sale is admitted to be good. The only question is as to the sufficiency of the affidavit, and there is nothing to shew that it is insufficient.

Foote, for the plaintiff. The former Bills of Sale Acts did not render attestation necessary. But by 41 & 42 Vict. c. 31 (Bills of Sale Act, 1878), s. 6, every bill of sale shall be duly attested and shall be registered under this Act, otherwise such bill of sale as against execution creditors shall be deemed fraudulent and void. By s. 10 a bill of sale shall be attested and registered under this Act in the following manner: Sub-sect. 1 provides that it shall be attested by a solicitor, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor. The attestation does so here. But sub-s. 2 enacts that such bill and a true copy, together with an affidavit of the time of such bill being made or given, "and of its due execution and attestation," and a description of . . . every attesting witness to such bill of sale . . . shall be filed. The affidavit here does not verify the "due attestation" but merely the signature, residence, and profession of the attesting witness. It is consistent with the affidavit that the solicitor who signed as attesting witness was not present at the execution of the bill of sale.

[HAWKINS, J. "Attestation," in sub-s. 1, must mean "attestation clause." It may be said that the same meaning should be given to the same word "attestation" in sub-s. 2.]

But the meaning there must be different, for an affidavit of the due attestation clause, which of course appears on the face of the bill of sale, would be useless, and would prove no more than that the attestation clause is what it seems to be. Just as "execution" in sub-s. 2 means the act of executing, so attestation

means the act of attesting. *Ex parte National Mercantile Bank, In re Haynes* (1), was cited by the claimant, but there the terms of the Act had been satisfied. Both the bill of sale and the affidavit seem to have been correct in form.

[HAWKINS, J. In *Roberts* v. *Phillips* (2) Lord Campbell, C.J., said of a will under s. 5 of the Statute of Frauds, "that the will should be attested by the witnesses; i.e., that they should be present as witnesses and see it signed by the testator, and that it should be subscribed by the witnesses in the presence of the testator; i.e., that they should subscribe their names upon the will in his presence." That is authority to shew that the being present and witnessing is the act of attesting, and in *Bryan* v. *White* (3), Dr. Lushington said: "'Attest' means the persons shall be present and see what passes, and shall, when required, bear witness to the facts."]

Lindsell, for the claimant. "Duly attested," in s. 8, means attested as prescribed in s. 10, sub-s. 1, which is satisfied in this case, for the execution of the bill of sale was attested by a solicitor, and the attestation states that before the execution of the bill of sale the effect thereof was explained to the grantor by the attesting solicitor. There can be a due attestation, although no explanation was in fact given: *Ex parte National Mercantile Bank, In re Haynes.* (1)

If the execution of a deed, viz., signing, sealing, and delivering can be proved by merely proving the handwriting of the maker, surely the evidence of attestation here is sufficient, omnia præsumuntur ritè esse acta.

[He referred to *Crawcour* v. *Salter.* (4)]

DENMAN, J. The point is one properly brought before us, for it is new, there is no direct authority on it, and at least a plausible argument could be founded on the construction of the word "attestation," as used in 41 & 42 Vict. c. 31. [The learned judge referred to ss. 8 and 10 and to the affidavit.] The attestation clause appearing on the bill of sale is in accordance with

(1) 15 Ch. D. 42.
(2) 4 E. & B. 450, at p. 453; 24 L. J. (N.S.) Q. B. 171.
(3) 2 Robertson, 315, at p. 317.
(4) 18 Ch. D. 30.

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sub-s. 1. But registration of the bill of sale is necessary; and an affidavit "of its due execution and attestation" must be filed. The meaning of the word "attestation" is, as appears from *Bryan* v. *White* (1), being present and seeing the execution; and unless the provisions of sub-s. 2 are complied with the filing will be nugatory and the registration void. Then is the affidavit here sufficient? The deponent does not swear that he saw the bill of sale duly attested. It is quite consistent with his oath that he did not see W. F. Law attesting the bill of sale.

I think the legislature was not content that there should merely be on the face of the bill of sale a clause of attestation purporting to be by a solicitor, purporting to be on a certain day and purporting to be after an explanation to the grantor; but has required that there should also be an affidavit which should state expressly that there was a due attestation, i.e., that the person attesting was present and saw the execution of the bill of sale. Of this I have no doubt. My Brother Huddleston who has just left the Court desires me to say that he is of the same opinion. The affidavit was defective, and therefore the registration invalid, and our judgment must be against the claimant under the bill of sale.

HAWKINS, J. I am of the same opinion. When the case was before me at chambers, I entertained a strong opinion that as the affidavit was defective the claimant could not succeed, but I was pressed by his counsel to reserve the point, and because of its importance I did reserve it for the Court. My opinion is unaltered. By s. 8 the bill of sale must be duly attested and duly registered. If either of those requirements is unfulfilled the bill of sale is void as against the execution creditor. Sect. 10, sub-s. 1, shews what attesting is required, and sub-s. 2 has reference to the registration, and provides that the bill and a copy together with an affidavit, of the due "execution and attestation" of the bill of sale, shall be filed. If that provision could be satisfied by the mere verification of the attestation clause as distinguished from the act of attesting, here is a bill of sale which purports to be attested by a solicitor, and here is an affi-

(1) 2 Robertson, 315.

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davit that he is a solicitor of the Supreme Court. But I do not think that is sufficient, because I think the intention of the legislature was that those who search the file shall have the guarantee of an oath, first, that the bill of sale has been duly executed, i.e., signed, sealed, and delivered by the grantor, and secondly, that it has been duly attested, i.e., the signature witnessed by a solicitor of the Supreme Court who has previously explained to the grantor the effect of the bill of sale. Therefore the affidavit must not only state, from the knowledge of the person who makes the oath, that the bill of sale has been signed, sealed, and delivered, but must also state on oath that it has been duly attested, that is to say, on the authority I have read, signed, sealed, and delivered in the presence of the witnesses, who purport to be the attesting witnesses, and that one of the attesting witnesses is a solicitor of the Supreme Court, and that, before the bill of sale was executed, that solicitor explained its contents. It is unfortunate in the present case that the affidavit is insufficient, because the bill of sale was an honest one, and yet a formal and technical objection must prevail. It is however desirable that the provisions of the legislature as to bills of sale should be strictly enforced; and the objection is not merely technical, because though there is an attestation clause, and the affidavit says that it was signed by the attesting solicitor, the affidavit nowhere states that the deponent in fact saw the bill of sale duly attested.

Claimant barred.

Solicitors for plaintiff: *Crowder, Anstie, & Vizard.*
Solicitors for claimant: *Wright & Law.*

J. R.

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Dec. 6.

MOYLE *v.* JENKINS.

Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *ss.* 4, 7—*Notice of Injury —Written Notice Necessary.*

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By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 4, an action for the recovery under this Act of compensation for an injury shall not be maintainable, unless "notice that injury has been sustained" is given within six weeks. By s. 7 notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date, and shall be served on the employer, and may be served by delivery or by post:—

Held, that notice under the Act must be in writing.

APPEAL from the Glamorgan County Court.

The action was brought under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), by a miner for negligence whereby he had been bodily injured in the service of the defendant.

On the 24th of March the plaintiff, while employed in the mine of the defendant, was hurt by an explosion of dynamite shattering his arm. The defendant came at once and saw the plaintiff, who told him of the accident. The plaintiff went to a hospital. On the 8th of April a letter, written for the plaintiff by the matron of the hospital, was sent to the defendant, saying, "I beg to inform you that it was found necessary to amputate the right arm of Alfred Moyle to-day, and he is getting on as well as can be expected."

On the objection of want of notice in writing under the Act, the county court judge nonsuited the plaintiff. Against a rule nisi to set aside the nonsuit, and for a new trial, on the ground that sufficient notice under the Employer's Liability Act, 1880 (1) was given to the defendant,

(1) 43 & 44 Vict. c. 42, s. 4. "An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice."

By s. 7, "Notice in respect of an injury under this Act shall give the

Evans, shewed cause. Notice in writing was necessary. None was given within the meaning of the Act. The letter does not satisfy s. 7, and was mere information as to the plaintiff's state.

Crump, in support of the rule. Notice in writing was not necessary. Other statutes requiring notice of action prescribe that it shall be in writing. This Act differs from them, probably because it is liberal to plaintiffs. Sect. 4 merely requires "notice that injury has been sustained," and not notice in writing; and by the proviso no notice whatever is needed in case of death, if the judge shall be of opinion that there was reasonable excuse for the want of notice. The defendant had "notice that injury had been sustained," for he saw the man lying injured on the spot, and was told by him of the injury, therefore that notice was enough, as no form of notice or formal notice is prescribed by the Act. Of course the notice may be in writing, and if it is, s. 7 directing what the notice shall contain and how it may be served, will then apply to it. But neither section declares that the notice shall be in writing. A workman is unlikely to be aware of such condition precedent of his action as a formal notice, and the plaintiff would certainly have been justified in supposing that his master had sufficient notice. In many cases the injured man lies ill and unable to go to a solicitor for advice until after the six weeks, within which time notice must be given, has elapsed. Therefore it is desirable that an informal notification of the injury should suffice. If written notice is required, the letter no doubt does not satisfy the terms of s. 7.

GROVE, J. This rule must be discharged. We have not to frame the Act but to interpret it, and we must do so according to the ordinary rules for the interpretation of Acts of Parliament.

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name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer . . ." and may be served by delivery or by post by a registered letter. . . .

"A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

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There can be no reasonable doubt of what the Act means, and to accept the argument for the plaintiff would be to frame another provision. Whether this should be done may be an open question. Reasons might be given for and against unwritten notice. Some have been suggested for it; against it is the fact that the employer would be placed in a difficult position if he did not have due notice of a claim imputing to him liability. Sect. 4 limits the times within which notice of injury shall be given and an action may be brought, and enacts that it shall not be brought without notice. The section prescribes no requisites for the notice, and if the clause stood alone there would be much in favour of Mr. Crump's contention. But s. 4 not having given the requisites of the notice s. 7 does so. The terms of s. 7 cannot refer to a verbal notice. All the provisions as to service through the post, &c., would be useless if verbal notice would suffice.

This is not a question of "defect or inaccuracy" in the notice. The letter mentioned in the case does not come in any respect within s. 7, and indeed it was not contended that it did. Then can it be said that s. 4 contemplated a verbal notice such as a workman saying to his employer, "I have broken my arm," when s. 4 merely refers to the time within which notice must be given, and s. 7 contains all the requirements of a written notice? It has been argued that s. 7 is immaterial if verbal notice is given. But I cannot separate s. 4 from s. 7 and thereby make s. 7 almost if not wholly useless. The Act has, for good reason, required notice to be given, to prevent frivolous actions, and to enable the employer to ascertain whether he is really liable or whether there has been an injury at all, or whether the claim is fraudulent. The proviso in s. 4, for dispensing with notice in case of death, seems to shew that the case of death is the only one in which notice is not necessary to the maintenance of the action.

LOPES, J. It is indisputable that the legislature intended to make notice a condition precedent of an action under the Act; but it is contended that the legislature did not intend that the notice should be necessarily written; Mr. Crump says that s. 4 may be read by itself, and that, under it, a verbal notice is enough. It is clear however that s. 4 was only intended to prescribe the times

within which notice should be given and the action should be brought. There is nothing in that section to shew whether the notice should be in writing or verbal. But the notice mentioned in s. 7 must surely be the notice required by s. 4, and the terms of s. 7 can refer to nothing but a notice in writing. There are express provisions as to what the notice is to contain and how it is to be served. I think a verbal notice is insufficient. A letter was sent in this case, but the learned counsel for the plaintiff rightly admitted that he could not rely on it as a written notice. It did not contain what is required by s. 7.

BOWEN, J. I am of the same opinion.

Rule discharged.

Solicitors for plaintiff: *J. J. & C. J. Allen.*
Solicitor for defendant: *Wrentmore.*

J. R.

RICHARDS, APPELLANT; McBRIDE, RESPONDENT.

Dec. 7.

Licensing Acts—Public-houses Sunday Closing (Wales) Act, 1881 (44 & 45 *Vict.* c. 61), s. 3—*Commencement of.*

By s. 3 of the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), passed on the 27th of August, 1881, "This Act shall commence and come into operation with respect to each division or place in Wales on the day next appointed for the holding of the general annual licensing meeting for that division or place":—

Held, that "the day next appointed" is the day which shall, after the passing of the Act, be next appointed for the holding of the meeting.

CASE stated by Justices of Flint under 20 & 21 Vict. c. 43.

On the hearing of an information preferred by the respondent against the appellant charging that he the appellant, on the 11th of September, 1881, at Saltbury, Flint, then being duly licensed to sell by retail intoxicating liquors in his house and premises, did then and there keep them open for the sale of intoxicating liquors during Sunday, contrary to the statute, &c., the facts charged were proved. It was also found as a fact that the annual licensing meeting for the township was held on the 8th of September, 1881, and had been appointed pursuant to 9 Geo. 4,

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c. 61, ss. 1, 2, prior to the 27th of August, 1881, the day on which the Sunday Closing (Wales) Act received the Royal Assent.

It was contended for the appellant, that the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), had not commenced and come into operation on the 11th of September, 1881, so far as regarded the township of Saltney, inasmuch as the said annual licensing meeting had been appointed before the passing of the Act.

The justices were of opinion that the Act had so commenced, and they convicted and fined the appellant.

The question was: Whether the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), had commenced and come into operation in the township of Saltney in the county of Flint, on the 11th of September, 1881.

Poland, for the appellant. The Act received the Royal Assent on the 27th of August, 1881.

By s. 3, "This Act shall commence and come into operation with respect to each division or place in Wales, on the day next appointed for the holding of the general annual licensing meeting for that division or place." That is, "the day next after this Act appointed;" otherwise the word "next" would have no effect. There is good reason for such construction. By 9 Geo. 4, c. 61, s. 1, the general annual licensing meetings must be holden on some day between the 20th of August and the 14th of September inclusive. Sect. 2 provides that twenty-one days at the least before such meeting justices shall appoint the day for it and cause notices thereof to be published. The general annual licensing meetings in some divisions of Wales were, in fact, held before the Sunday Closing Act passed, viz., between the 20th and the 27th of August, 1881. Therefore that Act cannot apply to those divisions until next August or September. After the passing of the Act, the twenty-one days' notice could in no case be given in time to hold a duly appointed general annual licensing meeting in 1881. The draftsman probably did not anticipate the delay which happened in passing the Act. So the accident of some justices having appointed an early day for the licensing meeting in their divisions would leave the

licenceholders within them free from the Act for nearly a year, whereas licenceholders in other divisions where the meetings were appointed for a later period, would, if the contention of the respondent were right, be subject at once to the Act and be compelled to close their houses throughout Sundays. Further; some persons in the divisions where the meetings have already been held took out licences to keep open on seven days in the week, while if they had supposed the Act could affect them they would only have taken out a licence to sell on six days a week.

The legislature intended to leave an interval of time between the passing and the operation of the Act.

Bankes, for the respondent. The preamble of the Act affords a good clue to discover the object of the legislature: *Halton* v. *Cove*, per Lord Tenterden, C.J. (1) It is recited in the preamble, that "the provisions in force against the sale of fermented and distilled liquors during certain hours of Sunday have been found to be attended with great public benefits, and it is expedient, and the people of Wales are desirous, that in the principality of Wales those provisions be extended to the other hours of Sunday." And by s. 1 licensed premises in Wales shall be closed during the whole of Sunday. The legislature evidently desired that the benefits of the Act should be taken at once. By s. 3 the Act shall commence on the day next appointed for the holding of the general annual licensing meeting. "Next" there must not be read as an adverb before "appointed," but as an adjective agreeing with "day." The phrase "day next" is as grammatical as "next day." The word "appointed" was put in because 9 Geo. 4, c. 61, s. 3, provides for an adjournment of the general meeting, and a difficulty might have arisen as to whether the Act was to commence on the day fixed for the meeting or on some day to which it was adjourned. "Appointed for the holding" are words descriptive of the day. Then it follows that "next" must be read with "day," and if so the contention of the respondent is right. On his construction this remedial Act will at least operate at once in some places, whereas on the construction suggested for the appellant the Act cannot operate anywhere until nearly a year has passed away. It is said that some public-houses would be

(1) 1 B. & Ad. 538, at p. 558.

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open on Sunday and others in adjacent divisions closed; but so it will be in all Welsh divisions contiguous to the English counties. A man against whom the public-houses in the county of Flint are closed will, by crossing the border, find them open in Cheshire. As to the licenses to sell during seven days in the week, many publicans, expecting the Act, only took out their licenses to sell on six days, and will therefore, if the Act does not operate on those subsequently licensed, see other public-houses open on Sunday when they cannot open their own.

The Act bears date the 27th of August, and the Court cannot notice what passed in Parliament or suggestions of mistake or delay: *Myers* v. *Perigal.* (1)

It was not the intention of the legislature that the Act should be in abeyance for twelve months. Being remedial it should be construed liberally: *Dapueto* v. *Wyllie.* (2)

Poland, in reply.

GROVE, J. I think that on the proper construction of 44 & 45 Vict. c. 61 the justices were wrong in convicting the appellant, and that he is entitled to our judgment. The words of s. 3 grammatically construed admit of no reasonable doubt. If we take them alone without consideration of matters outside the Act, and keep our minds blank as to any consequences, I can have no doubt that the words "the day next appointed" mean "the day which shall after the passing of the Act be next appointed" for the holding of the general annual licensing meeting. Mr. Bankes, who has fairly and well argued the case and called our attention to everything which might bear on it, is obliged, in order to support his contention, to read the phrase as though it were "the next day appointed," that is, to change the position of the words, and to change the word "next" from an adverb into an adjective.

No one in construing a statute or any other literary production could put such a construction on the words unless by supposing they were a mistake. But we cannot assume a mistake in an Act of Parliament. If we did so, we should render many Acts uncertain, by putting different constructions on them according to

(1) 2 D. M. & G. 619. (2) Law Rep. 5 P. C. 482.

our individual conjectures. The draftsman of this Act may have made a mistake. If so, the remedy is for the legislature to amend it. But we must construe Acts of Parliament as they are, without regard to consequences, except in those cases where the words used are so ambiguous that they may be construed in two senses, and even then we must not regard what happened in Parliament, but look to what is within the four corners of the Act, and to the grievance intended to be remedied, or, in penal statutes, to the offence intended to be corrected. Taking the words the "day next appointed" to mean what they say, viz., the day which shall be next appointed, is there anything in the Act itself to shew that the legislature meant "the next day appointed?" I find nothing. I even doubt whether if there were words in the Act tending strongly the other way, I could pass from the plain grammatical construction of the phrase in question. The onus of shewing that the words do not mean what they say lies heavily on the party who alleges it. He must, as Parke, B., said in *Becke* v. *Smith* (1), advance something which clearly shews that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity. I see no manifest repugnancy or absurdity, nor anything so contrary to the intention of the Act as to force us from the grammatical construction of it.

The learned counsel for the respondent relied on the preamble, and sought to draw from it an argument that because a beneficial result is contemplated the legislature must be assumed to wish the Act to come into operation as soon as possible. That is not necessarily so. There may be reasons in the mind of the legislature for naming a time for the Act to come into operation, and there are many instances of the period at which an Act is to operate being postponed. The legislature may well have meant to give the holders of licensed premises the interval of a year before the Act should come into operation. We cannot assume that, because the preamble suggests a change to be desirable, the legislature meant the change to be made as soon as possible after the Act, and that every word in it should be construed to forward such intention. If we did so we should assume what is

(1) 2 M. & W. 195.

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suggested, although we cannot regard it, viz., that the Act was expected to pass long before it, in fact, did. But that, even if we could take it into consideration, would rather aid the construction which the appellant puts on sect. 3. One other argument has been urged: as to the convenience or inconvenience attending the different constructions of s. 3. By Mr. Poland's construction the effect of the Act on all the licensed persons in the principality will be postponed for nearly a year, by Mr. Bankes' construction the Act would have effect in three or four weeks after it passed. If the latter could say that all would be affected by it his argument would be strengthened. But he cannot do so, for there may have been licensing meetings held in some divisions of Wales between the 20th and 27th of August, 1881, and in none of those cases would the Act come into operation for nearly a year after it passed. So that argument could not compel us to draw a necessary inference that the Act was intended to come into operation quam primum. Moreover, the success of that argument would be followed by this inconvenience which Mr. Poland's construction of the section does not produce, viz., that without any apparent reason a publican in one place would be immediately subject to the Act, while another publican in a contiguous place might be free of it for nearly a year, and this would be unequal.

LOPES, J. I agree with the judgment of my Brother Grove. I cannot doubt that it was the intention of the legislature that the Act should come into operation throughout Wales during the present year. The Court, however, is bound by the terms of the Act, and has no power to disturb the construction of the words in s. 3 so as to make them meet what seems to me the intention of the legislature. The Act received the Royal Assent on the 27th of August, 1881, and clearly speaks from that date. It says that "this Act shall commence and come into operation with respect to each division or place in Wales on the day next appointed for the holding of the general annual licensing meeting for that division or place." We have been asked to hold that "the day next appointed" must be read "next day appointed." This the Court cannot do unless the words as they stand in s. 3

are so repugnant and inconsistent with the rest of the Act as to make it absurd. I do not think they are so. If the legislature intended to say "the next day appointed" it seems strange indeed that they did not use words very clearly conveying their meaning, as they might, with ease, have done. If "the day next appointed" is to be read in the ordinary sense of the phrase, the Act certainly cannot come into operation until next year, for by 9 Geo. 4, c. 61 the general annual licensing meetings in the country must be appointed twenty-one days at least before the 14th of September, so the 24th of August in each year would be the last day for appointing such meeting.

Judgment for the appellant.

Solicitors for appellant: *Cunliffe, Beaumont, & Davenport.*
Solicitors for respondent: *Simmons, Hammond, & Co.*

J. R.

[IN THE COURT OF APPEAL.]

Dec. 5.

THE ATTORNEY GENERAL *v.* NOYES AND OTHERS.

Revenue—Succession Duty—Settlement—Reservation of Interest to Settlor—Alternative Conditions of Succession—Succession at a Fixed Time or on Death of Settlor—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 5, 10, 32.

A settlor, by deed containing no power of revocation, settled personal property upon trust for himself for a term of four years, if he should so long live, and at the end of the term, or at his death, whichever should first happen, upon trust for other persons. Before the end of the term the settlor died, and the persons entitled in remainder came into possession of the settled property:—

Held, by the Court of Appeal (Jessel, M.R., Brett and Cotton, L.JJ.), that as the succession actually took effect on the death of the settlor, succession duty was payable on the whole of the fund, and not merely on the income of it for the period between the death of the settlor and the end of the term.

INFORMATION to obtain payment of succession duty at the rate of 3*l.* per centum upon the death of James Blundell, in respect of the succession of his niece, Sarah Haighton Noyes, and his great nieces, Sarah Catherine Noyes and Ellen Haighton Noyes, to certain Government life annuities under an indenture dated

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the 1st day of April, 1875, of which the defendants were the trustees. (1)

The indenture was made between James Blundell of the first part, Sarah Haighton Noyes of the second part, Sarah Catherine Noyes of the third part, Ellen Haighton Noyes of the fourth part, and the four defendants of the fifth part, and recited that James Blundell was desirous of providing in the manner thereinafter expressed after his death, or after the expiration of the period thereinafter mentioned, for the maintenance, comfort, and benefit of his niece, S. H. Noyes, and his great nieces, S. C. Noyes and E. H. Noyes, and with that object had lately purchased a Government annuity of 800*l.*, payable by half-yearly payments during the life of S. H. Noyes, and another Government annuity of 210*l.*, payable by half-yearly payments during the life of S. C. Noyes, and another Government annuity of 210*l.*, payable by half-yearly payments during the life of E. H. Noyes, and had purchased such annuities respectively in the names of the four defendants. The indenture then witnessed that in pursuance of the said desire, and in consideration of the love and affection which he bore towards his niece and his great nieces, the said James Blundell, thereby declared and directed, and the four defendants thereby respectively declared, that immediately from and after the execution by James Blundell of the indenture, the four defendants or other the trustees or trustee from time to time of the indenture now in statement should hold the annuities of 800*l.*, 210*l.*, and 210*l.* in trust to pay the same to or permit the same to be received by James Blundell or his assigns for his or their use and benefit for the period of four years, commencing with the day of the date of the indenture, if James Blundell should so long live, and immediately from and after the expiration of the period of four years, or if James Blundell should die within that period (which event happened), then immediately from and after his death, as to the annuity of 800*l.* on the life of S. H. Noyes, in trust for her for her separate use; and as to the annuity of 210*l.* on the life of S. C. Noyes, in trust for her for her separate

(1) There was a similar indenture of the 18th of June, 1875, but the facts relating to it are omitted as no different question arose upon them.

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use, and as to the annuity of 210*l.* on the life of E. H. Noyes, in trust for her for her separate use.

James Blundell died on the 15th of January, 1878, before the expiration of the period of four years above-mentioned, and upon his death S. H. Noyes, S. C. Noyes, and E. H. Noyes became beneficially entitled to the respective annuities of 800*l.*, 210*l.*, and 210*l.*, by reason of the disposition thereof made by the indenture of the 1st of April, 1875.

Application was made to the defendants to pay succession duty at the rate of 3*l.* per cent. on the respective values of the annuities, but they declined to do so, and contended that duty was payable only on so much of the annuities as accrued between the death of James Blundell and the 1st day of April, 1879.

Mar. 9, 1881. *Sir F. Herschell, S.G.*, and *W. W. Karslake*, for the Crown. All the Court has to do is to look to the language of the instrument and the event that has happened, independently of any question how the successor might have been entitled on the happening of any other event. Here two events are provided for, and the persons who took did so on the death of the settlor. The Succession Duty Act (16 & 17 Vict. c. 51) taxes property and not the interest in property otherwise there would be a tax on a vested reversion. When the property is in possession the tax applies: *Wilcox* v. *Smith* (1); *Attorney General* v. *Lord Middleton.* (2) The whole property is intended to be taxed, and where the Act intends to tax something less than the whole property into which the successor comes, this is expressed in the Act. If this case is within s. 5 at all it can only be by placing on that section a construction which would bring every case of remainder within it.

Dryden (*Benjamin, Q.C.*, with him), for the defendants. That which the successors obtain is to be looked at, and not the mode in which it is obtained; the substance and not the form: *Le Marchant* v. *Commissioners of Inland Revenue* (3); *Attorney General* v. *Gell.* (4) When any person gains by the death of another the state is to profit, but gain is the obtaining of something

(1) 4 Drew. 40.
(2) 3 H. & N. 125.
(3) 1 Ex. D. 185.
(4) 3 H. & C. 615.

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which a person had not before, and in this case the gain is the interest in the property for one and a half years, that is the income for that period. Sect. 5 applies to this case for the property was in the defendants, but subject to the interest of the settlor, and on his death there was an increase of benefit to the defendants, which by the statute is to be deemed a succession and liable to duty, that increase of benefit was a year and a half of revenue. Sects. 21 and 48 are illustrations that the succession is equivalent to the amount of interest taken. Here the defendants had the reversion in them at the time of the death, and therefore could not have taken the whole property by reason of the death.

Sir F. Herschell, S.G., in reply.

Cur. adv. vult.

April 11, 1881. The following judgments were delivered.

LINDLEY, J. This case gives rise to the question upon what principle succession duty is to be calculated under circumstances which are somewhat peculiar, as the question is one of principle I need not allude to the actual details of the case, which are to be found in the information and the answer to it, and I shall deal with it as an abstract question without reference to the actual particular circumstances upon which it turns.

In this case we have to consider the principle on which succession duty is to be assessed under circumstances which in substance are as follows:—A settlor after 1853, by deed containing no power of revocation, settled personal property upon trust for himself for a term of four years, if he should so long live, and at the end of the term, or at his death, whichever should first happen, upon trust for other persons. Before the end of the term the settlor died; the persons entitled in remainder then came into possession of the settled property; and the question is, whether they ought to pay succession duty assessed on the whole of the settled property, or on some less sum, e.g., the income of it for the period between the death of the settlor and the end of the term. The Crown contends for the first view; the remaindermen for the second, upon the ground that all that they have in fact gained

by the death of the settlor is that they have come into possession of their property a little sooner than they otherwise would.

The solution of this question turns upon the proper construction of the Succession Duty Act (16 & 17 Vict. c. 51), and the difficulty in the case arises from three causes, viz.:—

1st. The fact that the remaindermen did, in the events which happened, come into possession of the trust property on the death of the settlor.

2nd. The fact that during his life they had a vested interest which must have fallen into possession at the end of the term, and that all they have really gained by the death of the settlor is that their possession of the property has been accelerated.

3rd. The fact that the Succession Duty Act in some of its sections uses the expression "property," and in others "increase of benefit accruing to a person," and imposes the duty on such "property" or "increase of benefit" as the case may be.

It is conceded, and is undeniable, that but for the second fact the remaindermen would have to pay duty assessed upon the whole trust property, for the case would then fall directly within s. 2 of the Act. It is also conceded, and is equally undeniable, that if the term of years had not determined by the death of the settlor, i.e., if the remaindermen had come into possession at the expiration of the term by effluxion of time, no succession duty would have been payable. It becomes necessary, therefore, to consider upon what property or interest in property duty is made payable by the Act, and what exactly is meant by the expression "increase of benefit" where that expression occurs.

In order to understand the Succession Duty Act, close attention must be paid to the definitions of property in s. 1, and of succession in ss. 1, 2, 3, 5, and 7. The duty on successions is imposed by s. 10, and this duty, whatever it may be, or on whatever succession it may be imposed, is never payable (unless previously compounded for) until such succession falls into possession, see s. 20; and when it does fall into possession the duty on it is payable according to the interest of the successor in it, either in one sum or by instalments, as prescribed by other sections of the Act.

Let us now take the case of a limitation to A. for life, with

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remainder to B. absolutely, ss. 2, 10, and 20 are then applicable. During A.'s life B. has a vested remainder, the value of which depends on the value of the property and the age of A. During A.'s life B. pays no duty. When A. dies, B. pays duty on the whole property, which then falls into possession. He does not pay on the difference between the value of the property in possession and the value of the remainder when it first vested in him; and yet in one sense this difference in value is the utmost beneficial interest, which accrued to B. on A.'s death. That, in the case supposed, B. pays on the whole property which falls into possession is quite plain if the case falls within s. 2, for in that section the word "property" is used, and no ambiguity is created by the use of the expression "beneficial interest" or "increase of benefit," and it is known as a matter of fact that remainders and reversions have always been dealt with on this principle ever since the Act has been in operation.

The 3rd section of the Act deals with joint tenants; and any beneficial interest accruing to any one of them by the death of any other of them is declared to be a succession, i.e., property chargeable with duty: ss. 10 and 20 must be read with s. 3, and it appears to me plain that what is meant in s. 3 by beneficial interest accruing is the share of the property which, on the death of one of the joint tenants, accrues in possession to his survivor. The beneficial interest accruing is not the value of the estate or interest of the deceased whilst he lived; nor the difference between the value of the survivor's chance of succession to the share of the deceased when he was alive, and the value of that share when it falls into possession; the beneficial interest accruing to the survivor, and taxable in his hands, is the whole share which, on the death of the deceased, accrued to the survivor in possession. Such cases as these have always, I believe, been dealt with on this principle ever since the Act passed; and it is obvious that any other principle would involve the possibility of one of many joint tenants succeeding, by the deaths of his co-tenants, to a very large property, and paying next to nothing for succession duty.

The 5th section relates to property subject to some charge, estate, or interest determinable on death, and enacts in substance that the increase of benefit accruing on the determination of such

charge, estate, or interest to the person beneficially entitled to the property subject thereto, shall be a succession, i.e., property chargeable with duty under the Act. This section must also be read with ss. 10 and 20; and here again it appears to me that by increase of benefit is meant that which is set free and accrues in possession to the owner of the property which was, but is no longer, subject to the charge, estate, or interest which has ceased. Let us see how ss. 5, 10, and 20 practically work, and consider the three types of cases which fall within them.

First, let us suppose that an estate worth 1500*l.* a year is subject to a life-annuity of 500*l.* a year, and becomes liable to succession duty during the life of the annuitant. In this case the estate is treated as a succession worth 1000*l.* a year, and the owner pays no succession duty on the 500*l.* a year; but when, by the death of the annuitant the owner comes into the enjoyment of the 500*l.* a year, he pays on the footing of a person then succeeding to an estate of that value. In this way he pays, as he comes into possession, the full duty on the whole property. But neither first nor last is the annuity valued, nor does the owner of the estate pay on the difference between the value of the estate, subject to the annuity and the value of the estate free from it. *Lord Advocate* v. *McDonald* (1) is an illustration.

Let us next take the case of an estate subject to dower. Here again, the increase of benefit accruing to the owner of the estate on the death of the doweress is the one-third of the estate or one-third of the rents, which the owner of the estate has not enjoyed during her life, but which accrues to him in possession on her death. *Harding* v. *Harding* (2) illustrates this.

Let us next take the case of property the whole of which is subject to a life estate. Although s. 5 was probably not framed on purpose to meet such a case as this, yet s. 6 serves to shew that s. 5 may include such a case, and *Wilcox* v. *Smith* (3) supports this view. So long as the life estate exists no duty is payable on the remainder or on the reversion (s. 20); but when the life estate ceases, the increase of benefit which accrues to the remainderman, and which is declared to be a succession, i.e., property

(1) 24 Scotch Sess. Cas. 1175, 27th Jan. 1862. (2) 2 Giff. 597.
(3) 4 Drew. 40. 3 Jur. N.S. 604

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chargeable with duty, is the whole property into the possession of which he comes. The same principle is as applicable to this case as to the case of the annuity or dower already considered; and it appears to me that, whether a remainder which falls into possession comes within s. 2 or s. 5, the same principle is applicable to it, and this view is supported by *Wilcox* v. *Smith* (1), where, though the facts were not like those we have to deal with, Kindersley, V.C., held the remainder to be within s. 2, and that it was immaterial which of the two sections was applicable. The principle underlying the whole statute appears to me to be that, when a person comes into possession of property on a death, the beneficial interest in it which then accrues to him, or the increase of benefit which then accrues to him, is the whole property which he so comes into possession of, and not the difference in value between that property and the value of any estate or interest he may have had in it before he came into possession of it.

In the event which happened the defendants in this case came into possession of a certain trust fund on the death of the settlor; and they are chargeable with duty accordingly; and they can, in my opinion, derive no benefit from the fact that if he had not died so soon they would have obtained the same property free of duty. It was indeed contended that the defendants were entitled to some allowance under s. 38, on the ground that they had, upon coming into the trust property on the death of the tenant for life, been deprived of their reversion expectant on the expiration by effluxion of time of the term created by the settlement. But s. 38 appears to me to contemplate two properties, one of which is gained and the other lost; and not two alternative titles to the same property, one of which takes effect and thereby excludes the operation of the other. The defendants, it is true, are deprived of the chance of not having to pay succession duty, but it is obviously absurd to say that they are deprived of that property into the possession of which they have come, and to which they are absolutely entitled.

My opinion in favour of the Crown is not based on s. 8, which relates to schemes to evade the Act. This settlement may have been made to evade the Act, but there is nothing secret or

(1) 4 Drew. 40.

fraudulent in the case, and moreover, the conclusion at which I have arrived is applicable to all limitations for terms of years determinable on a death. Whether the term is four years or ninety-nine years, or 1000 years, appears to me wholly immaterial. In my opinion, there ought to be judgment for the Crown as prayed by the information.

GROVE, J. I regret in this case to take a different view from my Brother Lindley, and therefore I need not say I have considerable doubt in the matter. I feel bound to give my judgment in this case against the Crown, and I will state to the best of my ability the reasons which lead me to do this.

The case is shortly this, a gentleman settled upon his nieces and grandnieces certain property to be theirs absolutely after four years from the date of the settlement, and he coupled this gift with the proviso that if he died within the four years they should get the immediate possession of the estate. He died about a year and a half before the expiration of the four years. For the Crown it is contended, that as the nieces got into possession of the property by his death, they are bound to pay succession duty upon the whole property. The opposite argument is, that as all they got by his death, and all they could get, was a succession to a year and a half of income, they having the property in them by an irrevocable settlement before, they are only bound to pay duty on the year and a half of income. I am of this opinion.

I think it is better to begin what I have to say by referring to s. 8, because it was a good deal argued before us by the learned Solicitor-General for the Crown, that this was in fact an evasion of the Act. The word "evasion" may mean either of two things. It may mean an evasion of the Act by something which, while it evades the Act is within the sense of it, or the word may mean an evading of the Act by doing something to which the Act does not apply. I do not know that in this case the settlor might not have done what he did—settled his estate—for the purpose of evading payment of succession duty; if he did so, but not corruptly within the meaning of s. 8, then he had a right to do so. He ran the risk at the expiration of four years of losing all his dominion over the property, and there can be no question

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either that if after the four years had expired he had continued to live, no succession duty would have been payable, or that if he had settled the property immediately no succession duty would have been payable. Had s. 8 applied, succession duty would have been payable upon the whole, but I agree with my Brother Lindley, that this case cannot be brought within the section, and indeed it was hardly argued that it could be. Assuming it not to come within that section, but to be a bonâ fide absolute conveyance of the property, then we come to consider how would this case stand supposing there had not been this relationship between the settlor and the persons upon whom he settled it. Now the second section, upon which my Brother Lindley relies, I do not quite read in the same way as he does. I think it has a more limited effect. It may be observed that section uses not only the word "property," but the words "by reason whereof a person has or shall become beneficially entitled to property," and also afterwards "and every devolution by law of any beneficial interest in property." For the definition of the word "property" I look to the interpretation clause, and it is there thus interpreted: "The term 'real property' shall include all freehold, copyhold, customary leasehold, and other hereditaments, and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland, money secured on heritable property in Scotland, and all estates in any such hereditaments." Therefore "property" according to that does not appear to me in any way to involve in all cases the whole fee-simple of the property, but an estate in property, and the definition of "succession," upon which I shall have a word or two to say in a moment, is, "The term 'succession' shall denote any property chargeable with duty under this Act." Now "property" there seems to me to mean the substratum upon which succession duty is to attach, but my view is that it is to attach, not as to those paying it in respect of the whole property when the property first comes into their possession by death—it does so in some cases—but substantially in respect of their beneficial interest. That I think is clear from several sections of the Act. Not only are the words "beneficial interest" and "beneficially entitled" used in this section, but in s. 5 there is this provision: "Where any property shall at

or after the time appointed for the commencement of this Act be subject to any charge, estate, or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or persons upon the extinction or determination of such charge, estate, or interest shall be deemed to be a succession accruing to the person, or the persons if more than one, then entitled beneficially to the property or the income thereof, according to his or their respective estates or interests therein, or beneficial enjoyment thereof; and the person or persons from whom such successor or successors respectively shall have derived title to the property so charged shall be deemed to be the predecessor or predecessors, as the case may be." Now it is true this does not in words apply to the present case, but it comes close to it, at all events it shews that the word "property" in the 2nd section does not mean the whole corpus of the property, but the beneficial interest into which the successor comes. So again ss. 35, 36, 37, and 38, give the mode of estimating the value of a succession and the allowances to be made. These and other sections to the same effect in the Act, all to my mind tend to shew that the payment of succession duty is in prospect of the beneficial interest which the successor gets by the death of the settlor. When he does not get the property by death he pays no succession duty. It is true in certain cases, to which my Brother Lindley has referred, the first successor, who gets the property which coalesces with a subsequent reversion, but all of which comes upon the death of the testator, has to pay succession duty upon the whole, but to my mind those cases do not apply to this case where a person has got it by an independent conveyance totally irrespective of and having nothing to do with the death of the predecessor, so that the party gets nothing by that death except the benefit of the intermediate period which would elapse before he could otherwise get into the property, and there is no alteration of his claim to the property after the lapse of so many years.

Sect. 10 is "There shall be levied and paid to her Majesty in respect of every such succession as aforesaid, according to the value thereof, the following duties." That again, to my mind, goes to shew that succession duty is not to be paid upon the

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property in any sense as a whole, but according to the value of that which the party succeeds to. In this case there is an absolute vested reversion in the nieces at four years from the date of the settlement. The reversion can be sold in the market and it is to all intents property which can be dealt with as far as purchase and sale goes. It is true they cannot enter upon it, but it has all the incidents of property which is not liable to succession duty if the four years elapse.

Now what is the difference—and to my mind I cannot discern a substantial difference—between this case and the case of the nieces having obtained or purchased an estate from another source, not from their uncle but from somebody else, but subject to a four years' lease determinable with the uncle's lifetime or with some other person's lifetime? The case I am now supposing, it seems to me, would come directly within s. 5. It may be the present case does not come directly within s. 5. They would have in the case I am supposing certain property on which there was an outstanding charge, estate, or interest determinable by the death of a person, and then a period ascertainable by reference to such death, and then (I am reading the words of the section) "the increase of benefit accruing to them upon the extinction or determination of such charge shall be deemed to be a succession." They therefore would only have to pay succession duty upon the increase of benefit by the lease falling in by their uncle's death. That is substantially the present case. So, again, if the settlor conveyed the whole estate to his nieces, but they agreed to pay him or hand over to him the rent of the estate for four years, but ceasing at his death, that would come within s. 2. That is very close to the present case. Here, if the successors are liable to pay duty on the whole estate, I see no reason why, in the case of a sale by A. to B. of a reversionary estate for value, subject to a lease for four years, if the tenant shall so long live, the purchaser should not be liable to succession duty upon the whole if the tenant dies within four years.

I cannot avoid thinking there is underlying the argument of the Crown a fallacy which arises from the tacit assumption that this is in fact an evasion of the Succession Duty Act, and if this had been a case between strangers I doubt whether it would

have been brought forward. Suppose, for instance, the owner of an estate wished to sell it, but before doing so wished to conclude some agricultural experiments. Being engaged in those experiments he says to the buyer, "I cannot hand over possession to you now, but I will sell you the reversion of it after four years, retaining possession of it for that time in order that I may finish the work I am upon if I so long live." It seems to me it would be a very strong thing to say the Crown could obtain succession duty upon the whole from the buyer, because the seller has reserved a certain limited interest for a certain time. I doubt whether that would have struck the advisers of the Crown as a case for claiming succession duty. I have put these cases to shew if you get rid of the idea of the kinship between the parties, and present as between strangers the identical case, it is not within the provision of the Act. Many hypothetical cases were adduced in argument to shew how the Act might be evaded if the Crown failed in this case. It appears to me two answers may be given to the argument founded on these cases. First, there must in every law be marginal cases which come very near the point at which the statute may be avoided; and, secondly, the persons intending to avoid the operation of the statute can always succeed by doing it directly. If a man with a mortal disease, although he knows he cannot live six months, chooses to convey his property to his heirs expectant he may do so, and they will pay no succession duty. So, again, an old man may do so. He may hand over his property by a bonâ fide conveyance. Yet in both cases, in one sense of the word, the donor evades the Act, that is to say, he conveys the property in such a way that the parties do not pay succession duty. But in both these cases the parties run some risk, and that is the check which enables the Crown substantially to get succession duty. A man, however old he may be, cannot be certain how long he will live. He might give a long lease so as to be tolerably certain it will last his lifetime, or he might give a short lease, and yet he may outlive it. So, again, a man may recover or linger on for a long time, and at the expiration of the term find himself deprived of his property. What really prevents the evading the Succession Duty Act, which everybody may evade by giving his property

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away, is the strong disinclination which the bulk of the community have to part with their property or their dominion over it, or the power of testamentary disposition of it.

I think there should be judgment for the defendants, without costs.

A. M.

Lindley, J., having withdrawn his judgment, judgment was given for the defendants.

The Attorney General appealed.

Dec. 5, 1881. *Sir F. Herschell, S.G.*, and *W. W. Karslake*, for the Crown.

Benjamin, Q.C., and *Dryden*, for the defendants.

JESSEL, M.R. It is the duty of judges in all cases to give fair and full effect to Acts of Parliament without regard to the particular consequence in the special case, and not to indulge in conjecture as to what the legislature would have done if a particular case had been presented to their notice. We first of all have to see what the Act of Parliament says, and then apply it to the case, and I do not think it is a fair criticism on an Act of Parliament to say that the result will be unfair, or that it will result in making people pay duty who ought not to pay duty.

Now, it appears to me to be beyond doubt that the second section applies to this case. There is a succession within the terms of that section, and the death of James Blundell was the event upon which the succession arose, James Blundell himself being the predecessor. Then the 32nd section says this, that certain provisions of the Legacy Duty Act shall apply "to the personal property comprised in any succession, and to the assessment and payment of duty thereon, as if such personal property were a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions." That is, they apply when they have any application. The 10th section states the amount of duty to be paid, but it is plain that under s. 32 the provisions of the Legacy Duty Act apply, as if such personal property were a legacy bequeathed by the predecessor to the successor. That is the result of the Act. The only other section

which it is necessary to refer to is s. 5 which, though it does not determine, aids the construction. The words are: "Where any property shall at or after the time appointed for the commencement of this Act be subject to any charge, estate, or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or persons upon the extinction or determination of such charge, estate, or interest shall be deemed to be a succession accruing to the person, or the persons if more than one, then entitled beneficially to the property or the income thereof, according to his or their respective estates or interests therein." These words I take to mean, that when a person is in possession of property, if any other estate or charge upon the property comes to an end by reason of death, the increase of income is to be charged.

Now, that being so, what have we here? On the death of James Blundell the event happened by which the successor became entitled, and the whole of the property—that is, the personal property which is to be treated as if it were a legacy by the predecessor to the successor—is the property comprised in the succession. James Blundell did not survive the four years, and a title accrued at that period and at that period only. What was argued was this, that as the defendants would succeed in any event at the end of four years, they only gained by the death of James Blundell the amount of income which accrued in those four years. That is quite true. That is all the benefit they got, but that is not what the Succession Duty Act says you are to look to. It does not apply merely to the increase of benefit which would accrue to the successor. The duty attaches to the property he acquires by reason of or upon the happening of the event, being an event depending upon the termination of human life, on which his title accrues. This is quite as much within the spirit of the Act as it is within the letter. The event has occurred upon which the defendants' title accrued.

Now I never heard in the case of succession duty that the fact of an alternative event possibly happening could make any difference. I put, in the course of the argument, the case of an estate limited during widowhood. There, no doubt, if the widow married again, the successor would have no duty to pay, although he would

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have to pay duty if she died before she married again. The difference between the possibilities of her death and of her marrying again is not to be taken into consideration. You might have an estate dependent on twenty different events—assignment, bankruptcy, and so on. One of these events might be death, and if the death happens the title accrues upon the death, and succession duty would be payable although there might be an enormous probability of the successor becoming entitled to the estate in one or other of the other nineteen ways rather than by the death. There is nothing in this case to distinguish it from the ordinary cases under the Act of Parliament, and I am not at all sure that the result of a contrary decision would be quite as much within the spirit of the Act. As was suggested in argument, you may have a very old man who is certain, in all human probability, not to survive a given number of years, and he may settle his property in this fashion; and in the case supposed, though it is on his death the person becomes entitled, there would be no duty, or next to no duty, payable to the Crown. That may be called, no doubt, an avoidance of the Act, but still, if you look at the spirit of the Act, which was that those persons who should by free gift acquire property from another, should pay duty upon coming into the property, such a case was one which the Act was intended to cover. But I prefer to rest my decision upon the letter of the Act. The judgment of the Court below should be reversed.

BRETT, L.J. It is not doubted that this case is within s. 2, that there has been a succession, and that some succession duty is payable. The question is, how is that section to be applied to a disposition containing alternative conditions? It seems to me that the decision in all these cases depends on a consideration of the application of the disposition in question to the death of the settlor, and I think that where, by reason of a voluntary disposition, a beneficial interest in property comes into the possession of, or takes effect in favour of, one person on the death of another, succession duty must be paid on the full value of that property, without regard to the consideration that by the same disposition the same interest in the same property might, on the happening of some other condition, have come to the same person at another

time than on the death of the other. The condition which has not happened is not to be regarded.

Now, in this case of the two conditions—death within the four years and death after the four years—the only condition which happened was the death of James Blundell within the four years. Immediately upon that condition happening the whole interest passed into the possession of these nieces, or took effect immediately. Therefore, the other alternative which never happened is to be disregarded as if it had never been in the settlement at all. That seems to me to be the true construction of s. 2, and the true construction of the disposition in this case, and, applying the one to the other, it seems to me that our decision must be in favour of the appeal. It was argued that s. 32 could help us to a different construction. It seems to me that s. 32 does not apply at all, but that even if it had applied, it would not have helped us to say what ought to be the right conclusion, because the provisions of the Legacy Duty Act would not have been applicable until it had been determined what was the thing to which they were to be applied. That did not depend upon s. 8, and it did not depend upon s. 32, but upon the application of s. 2 to the disposition in this case. With regard to s. 38, any argument that was founded upon it seems to me to be untenable.

COTTON, L.J. We may obtain assistance from other sections of the Act, but the 2nd section is the material one. That section provides that "Every disposition of property by reason whereof any person shall become beneficially entitled to any property after the death of any person, either immediately or after any interval, either certainly or contingently, shall be deemed to confer on the person entitled, by reason of any such disposition, a 'succession'" within the meaning of the Act.

In this case there were two alternative events, the survival after the four years, and the death before the four years were ended. When James Blundell died before the four years were ended, the nieces became entitled within the 2nd section. It is said that their succession was hastened, but this is a fallacy which arises from treating the case as if it were one where the limitation was only after the four years, without any contingency of death. It is

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argued, too, that the ultimate interest belonged to the nieces as soon as the settlement was made, by reason of the trustees holding it for the four years, but I think that the trustees held it not for them but for them and James Blundell together, as being entitled, for different interests, under the terms of the settlement.

Then s. 5 is relied on. But I think that this section tells against the respondents, for it provides for the case of a person having property relieved from a burden by the death of another, which is to a certain extent their case. Lastly, I cannot see how the rules under the Legacy Duty Acts can help us in construing a section which shews what property is chargeable before the rules under those Acts come into operation.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for Respondents: *S. F. & H. Noyes.*

J. E. H.

Dec. 12.

[IN THE COURT OF APPEAL.]

THE CHINA TRANSPACIFIC STEAMSHIP COMPANY *v.* THE COMMERCIAL UNION ASSURANCE COMPANY.

Insurance, Marine—Policy, Action on—Discovery of Ship's Papers—Form of Order—Whether rightly made on all Persons interested—Continuance of Practice in Force before Judicature Acts—Rules of Supreme Court, Order XXXI., r. 11, *and Order LX A, r.* 12.

In an action on a policy of marine insurance, underwriters are entitled to discovery of ship's papers, in accordance with the practice in force before the Judicature Acts, without an affidavit, and from all persons interested in the proceedings.

APPEAL by the plaintiffs from an order of a Divisional Court affirming an order of Bowen, J., and a Master, for discovery of ship's papers in an action upon a marine policy.

The plaintiffs were shipowners, and the defendants were underwriters, and the action was to recover a particular average loss amounting to 83*l.* 18*s.* 8*d.*, being a proportion of 2308*l.* 3*s.* 1*d.*, the whole amount recoverable on all the policies effected on the

ship *Vancouver*, in respect of damage on a voyage from Hong Kong to San Francisco. No consolidating order had been obtained or applied for.

The order appealed from, which was granted without any affidavit, was in the Form H. 17, scheduled to the Rules of the Supreme Court, April, 1880 (1), which is described as being drawn up on reading an affidavit, and leaves blanks for the name of the party making the affidavit, and for the names of the parties on whom the order is made. The master in dealing with the form had struck out the reference to the affidavit, and had, by a manuscript insertion, ordered that "the plaintiffs and all persons interested in these proceedings, and in the insurance the subject of this action, by the oath of their proper officer," do produce and shew "to the defendants, their solicitors, or agents," upon oath all insurance, ship's policies, and so forth, in the terms of Form H. 17, adding, however, "powers of attorney" to the papers therein enumerated, describing the papers as in the possession, &c., of the "plaintiffs and the said other persons aforesaid, their or any of their" brokers, &c., giving liberty to the "defendants, their solicitors, or agents, or any or either" of them, to inspect, &c., and concluding with the direction that "in the like manner the plaintiffs and the said other persons as aforesaid do account for all such documents as were once, but are not now, in their or any of their possession, custody, or power."

In so dealing with the form the master had followed the practice in force before the Judicature Acts.

J. Shiress Will (*Todd*, with him), for the plaintiffs. The plaintiffs are ready to give all reasonable discovery, but this order is too large, and cannot be sustained. The defendants are entitled

(1) By rule 52 of these rules, directed to be cited as Order LX A., rule 12, "the additional forms contained in the schedule hereto shall be used in and for the purposes of the central office, with such variations as circumstances require."

By Order XXXI., rule 11, "it shall be lawful for the Court or a judge, at any time during the pendency therein of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

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to discovery from the plaintiffs only, and of material documents only. The object of the old practice was to save the expense and delay of a bill of discovery, which is now no longer necessary, so that the old practice falls with it. Form H. 17 must be read with Order XXXI., rule 11, which expressly limits discovery to documents in the possession of a party to the action, and the blank in that form was intended to be filled up by the names of parties only. If persons interested had been intended to be brought in, the form would have been printed accordingly. The Court has no jurisdiction to order a party to give discovery of documents not in his possession: *Fraser* v. *Burrows*. (1) It must be admitted that *West of England and South Wales District Bank* v. *Canton Insurance Co.* (2), is against the plaintiffs; but that case was decided before the Form H. 17 was promulgated, and therefore has not so much application here as it would otherwise have.

At any rate the order ought not to affect documents relating to cargo. [He also cited *Wilson* v. *Raffalolich*. (3)]

[COTTON, L.J., as to the necessity of an affidavit, referred to *Rayner* v. *Ritson*. (4)]

Hollams, for the defendants, was stopped by the Court.

JESSEL M.R. This appeal has been brought under a misapprehension. The plaintiffs allege that they are the only parties interested, and appeal against an order which follows a common form in use before the Judicature Acts. Now, before that Act very large discovery had been granted for the reason, as pointed out by Cockburn, C.J., in *Rayner* v. *Ritson* (5), that the underwriters are in the dark, whereas the shipowner knows everything, and this very large discovery included discovery by all parties interested. This discovery therefore, was granted and a stay ordered until it was made; but the stay was not an absolute stay. If the plaintiffs produced all the documents they could get, and did all they could to get the other documents, if any, the stay was taken off.

(1) 2 Q. B. D. 624.
(2) 2 Ex. D. 472.
(3) 7 Q. B. D. 553.
(4) 35 L. J. (Q.B.) 59.
(5) 35 L. J. (Q.B.) 61.

It is suggested that, as the plaintiffs are solely interested in the ship, the words "all parties interested" include the other underwriters, but I am quite clear that the other underwriters are not interested within the meaning of the order, which can only affect persons on the same side as the plaintiffs.

Then the question has been raised whether the defendants ought to have made an affidavit before they could properly obtain an order in this form. That might have been the practice, but it has not been shewn that it is, and I do not think that we ought to make a new practice. The order made can do the plaintiffs no harm.

With regard to the construction of the rules, it has been decided in *West of England and South Wales District Bank* v. *Canton Insurance Co.* (1), and I agree with the decision, that the right to discovery is conferred in affirmative terms, and in such manner as not to exclude all other modes of discovery. The preface to the rules declares this in the most explicit words, and I may say as chairman of the original committee which framed the rules, that I knew at the time, and every other member of the committee knew, that a very large body of practice was left unprovided for by the rules.

BRETT, L.J. Long before the Judicature Acts, the peculiarity of insurance business had given rise to a practice, both in Chancery and at common law, of granting discovery to a larger extent than in ordinary business. The reasons for this are not far to seek. The underwriters have no means of knowing how a loss was caused; it occurs abroad and when the ship is entirely under the control of the assured. In addition to this the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who these persons are, especially at the time of the loss, is entirely unknown to the underwriters. The practice, therefore, arose of making the order on all parties interested, without an affidavit. Then after the Judicature Acts, the question arose whether this practice had been altered, and it was held in *West of England and South Wales*

(1) 2 Ex. D. 472.

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District Bank v. *Canton Insurance Co.* (1) for the reasons there given, that it had not. As for the hardship on the plaintiffs, Cleasby, B., who was beyond all others conversant with this head of the law, points out in the same case that a plaintiff must shew that he has used every effort to discover, and that if he has bonâ fide done all he can, he will not be prejudiced.

It has been suggested that as the policy is on the ship alone, all that relates to the cargo ought to be struck out, but I do not agree with this. Documents relating to the cargo only may be very material, as shewing for instance that a voyage was an illegal one.

I think, therefore, that it is wise and right and according to law that this form of order should be maintained.

COTTON, L.J. I agree. At first I doubted whether the underwriters ought not to make an affidavit that other parties were interested besides the plaintiffs, but my doubt is now removed, and I think that the practice obtaining before the Judicature Acts ought not to be disturbed.

Appeal dismissed.

Solicitor for plaintiffs: *G. M. Clements.*

Solicitors for defendants: *Hollams, Son, & Coward.*

(1) 2 Ex. D. 472.

J. E. H.

[IN THE COURT OF APPEAL.]

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Dec. 20.

PEAT *v.* JONES & CO.

Trustee in Liquidation, Action by—Set-off for Unliquidated Damages—"Mutual Credits and Dealings"—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 39.

The right of set-off under the Bankruptcy Act, 1869, extends to unliquidated damages.

Such set-off may be pleaded by the defendant to an action by the trustee without recourse to a Court of Bankruptcy.

H., who had contracted to deliver iron to the defendants by successive monthly deliveries, sued for the price, and went into liquidation. The plaintiff, who had been appointed trustee, continued the action. The defendants counter-claimed damages for non-delivery of part of the iron :—

Held, by the Court of Appeal (Jessel, M.R., Brett and Cotton, L.JJ.), that these unliquidated damages could be pleaded as a set-off to the plaintiff's claim.

THIS was an action to recover the sum of 150*l.*, being the unpaid balance of the price of certain rods of iron, which one Hill had contracted to deliver to the defendants by three monthly deliveries of fifty tons, at 7*l.* 10*s.* per ton. The defendants admitted their liability, but set up a counter-claim for damages arising from non-delivery and a rise in the price of iron. The action was originally brought by Hill himself, but, Hill going into liquidation, was continued by the plaintiff as his trustee.

At the trial before Grove, J., the jury found for the defendants on the counter-claim, and judgment was entered for the defendants. A Divisional Court (Denman and Lindley, JJ., Grove, J., diss.), ordered judgment to be entered for the plaintiff for 150*l.*, on the ground that the case was governed by *Ogle* v. *Earl Vane*. (1)

The defendants appealed.

After hearing counsel on the questions raised by the appeal, the Court mero motu directed the further question to be argued whether such a counter-claim could be supported against a trustee in liquidation under s. 39 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). (2)

(1) Law Rep. 3 Q. B. (Ex. Ch.) 272.

(2) Bankruptcy Act, 1869, s. 39, "Where there have been mutual credits, mutual debts, or other mutual dealings, between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due

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R. V. Williams, for the defendants. Under former Bankruptcy Acts, in the mutual credit clause of which the term "mutual dealings" did not occur, unliquidated damages were allowed to be set off: *Makeham* v. *Crow* (1); *Gibson* v. *Bell* (2); and, though the decisions are not quite uniform, their tendency, as well as that of the legislation on the subject, is to extend the application of the mutual credit clauses, and *Booth* v. *Hutchinson* (3) settles beyond doubt the application of the present clause, which contains the term "mutual dealings" for the first time, to unliquidated damages.

[He also cited *Alsager* v. *Currie* (4); *Hulme* v. *Muggleston* (5); *Bittleston* v. *Timmis* (6); *West* v. *Baker* (7); *Rose* v. *Hart*. (8)]

Moreover, it is plain from *Gibson* v. *Bell* (2), from the precedent, in Bullen and Leake (9), and from a long series of decisions, that the set-off was allowed to be pleaded in a common law action by the assignees or trustees. [He was stopped on this point.]

Forbes, Q.C., for the plaintiff. It was no doubt held in *Booth* v. *Hutchinson* (3) that the right of set-off under s. 39 of the Bankruptcy Act, 1869, extends to unliquidated damages, but this Court is not bound by that decision. That case moreover was in a Court of Bankruptcy, and is therefore distinguishable. The defendants ought to have applied to a Court of Bankruptcy to stay the action until they had proved their claim. The analogy of *Newell* v. *National Provincial Bank of England* (10) in respect of debts proveable in administration actions, and *Sankey Brook Coal Co.* v. *Marsh* (11), in respect of debts proveable in winding-up, ought to be followed. It is unjust that the liquidator should be forced to defend a claim, the defending which might result in a personal liabilty for costs.

JESSEL, M.R. For the purpose of the questions we are about to decide, this counter-claim must be treated as a set-

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from the other party and the balance of such account, and no more, shall be claimed or paid on either side respectively. . . ."

(1) 15 C. B. (N.S.) 847.
(2) 1 Bing. N. C. 743.
(3) Law Rep. 15 Eq. 30.
(4) 11 M. & W. 14.
(5) 3 M. & W. 30.
(6) 1 C. B. 389.
(7) 1 Ex. D. 44.
(8) 8 Taunt. 499.
(9) 3rd ed. tit. Set-off, p. 687.
(10) 1 C. P. D. 496.
(11) Law Rep. 6 Ex. 185.

off. The question is whether such a set-off can be maintained against a trustee in liquidation or bankruptcy (for there is no difference between the two). Now the enactment as to "mutual credits" is a very old one, first appearing in 5 Geo. 2, c. 30, but the whole tendency of the subsequent legislation, as of the legislation respecting proveable debts, has been to extend the principle on which it is founded. The statutes, however, contemplate the set-off being allowed in the Bankruptcy Court. This being so, if the debtor were sued in a common law Court, he could apply to the Court of Bankruptcy for an injunction to restrain the assignee from suing him. Then the Courts of common law, having regard to the equity of the statute, went a step further, and allowed the debtor to plead the set-off in the Court of common law itself without being under the necessity of applying for an injunction. This practice has been recognised in a series of decisions. The legislature must be taken to have been aware of the effect of those decisions when it passed the Bankruptcy Act, 1869, and not to have intended to alter the law. We are therefore bound to hold that the defendant was entitled to have the benefit of the set-off. But it is said that the enactment only applies to mutual debts and credits and not to damages liquidated or unliquidated, on the ground that it would be a hardship on the trustee to make him liable to costs. What we have to consider, however, is whether such claims as these are properly the subject of set-off or not. I think that they are, because a contract of sale and purchase is in its nature mutual, imposing reciprocal obligations on the vendor and purchaser. Any claim arising out of the mutual dealings could be set off.

BRETT, L.J. I also think that the set-off can be maintained. It is said that it does not arise out of mutual credits or dealings, but I think that it does. It seems to me that the expression "mutual debts and credits" was intended to comprise all ordinary transactions between the two persons in their individual capacities, and that "mutual dealings" was added to get rid of any questions which might arise whether a transaction would end in a debt or not. As was said by Malins, V.-C., in *Booth* v. *Hutchinson* (1), the

(1) Law Rep. 15 Eq. at p. 35.

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additional words were intended to give a more extended right of set-off than previously existed.

Then it is said that the set-off was available only in the Court of Bankruptcy. But it will be found to have been held otherwise in a series of cases upon the old statutes, in which a Court of common law treated the claim of the plaintiff and the answer to it as the Court of Bankruptcy would have treated them. That, being a principle, is applicable also to a case under the present statute. If cut down to a set-off, therefore, the counter-claim is maintainable.

COTTON, L.J. As a trustee in bankruptcy cannot be sued, a counter-claim is not maintainable against him, except so far as it is reduced to a set-off. But a succession of cases shews that a set-off was long treated as a good defence at common law, and I think that the principle of those cases applies to the mutual credit section of the present Bankruptcy Act, although that section is more pointed at an administration in bankruptcy than its predecessors were. *Gibson* v. *Bell* (1) shews that the principle was applied even before it was embodied in a statute at all, and as we are dealing with this case as a Court of Equity as well as of law, we ought to extend rather than narrow the application of it. I think that this set-off comes within s. 39 of the Bankruptcy Act, 1869, although it would not have come within prior mutual credit clauses. "Mutual dealing" means obligation arising between the parties themselves, perhaps in the same rights. We have here a claim for damages arising out of a contract which could have been proved as a debt. Therefore, when so ascertained by a jury, it becomes a mutual dealing to be dealt with just as if it had been brought into account in bankruptcy proceedings.

Appeal allowed to the extent of deducting damages for non-delivery from the amount recovered by the plaintiff.

Solicitors for plaintiff: *Van Sandau & Co., for Belk & Co., Middlesbrough.*

Solicitors for defendants: *Clapham & Fitch.*

(1) 1 Bing. N. C. 743.

J. E. H.

REG. ON THE PROSECUTION OF GILLINGHAM *v.* PAGET.

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Dec. 20.

Justices—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 21, 35—*Sum of Money "claimed to be due"—Railways Clauses Consolidation Act* (8 *Vict. c.* 20), *ss.* 103, 145—*Penalty for Travelling with intent to avoid payment of Fare—Distress Warrant—Procedure.*

The penalty imposed by s. 103 of the Railways Clauses Consolidation Act (8 Vict. c. 20), for travelling in a railway carriage without having paid the fare and with intent to avoid the payment of it, is not "a sum of money claimed to be due and recoverable on complaint to a court of summary jurisdiction" within the meaning of s. 6 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and is not subject to the procedure for the recovery of civil debts in a court of summary jurisdiction prescribed by s. 35 of the same Act.

RULE calling on J. Paget, Esq., magistrate for Hammersmith police court, to shew cause why a mandamus should not issue commanding him to proceed with an information or complaint preferred by J. Gillingham against T. Clapham, for an offence against s. 103 of the Railway Clauses Consolidation Act, 1845 (1), and that any penalty or forfeiture to be imposed on conviction

(1) The Railways Clauses Consolidation Act (8 Vict. c. 20), s. 103, imposes a penalty upon persons travelling in any carriage of a railway company without having previously paid the fare, and with intent to avoid payment thereof.

By s. 145, Every penalty or forfeiture imposed by this or the special Act, or by any by-laws made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices; and on complaint being made to any justice he shall issue a summons requiring the party complained against to appear before two justices at a time and place to be named in such summons, and upon the appearance of the party complained against, or, in his absence, after proof of the due service of such summons, it shall be lawful for any two justices to proceed to the hearing of the complaint, and that although no information in writing or in print shall have been exhibited before them; and upon proof of the offence either by the confession of the party complained against or upon the oath of one credible witness or more, it shall be lawful for such justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty or forfeiture incurred, as well as such costs attending the conviction as such justices shall think fit.

By s. 146, If forthwith upon any such adjudication as aforesaid, the amount of the penalty or forfeiture, and of such costs as aforesaid be not paid, the amount of such penalty and costs shall be levied by distress, and such justices or either of them shall issue their or his warrant of distress accordingly.

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might be enforced in default of payment by distress and imprisonment pursuant to the Act.

It appeared upon affidavit that Clapham was summoned under s. 103 of the Railways Clauses Consolidation Act for the offence of travelling in a carriage of the Great Western Railway Company without having paid the fare, and with intent to avoid payment of it. On the day appointed for the hearing Clapham did not appear, and application was made for a warrant for his apprehension to answer the charge under 11 & 12 Vict. c. 43, s. 2.

The magistrate was of opinion that the penalty sought to be recovered was a sum of money recoverable on complaint and not upon information, and was a civil debt under s. 6 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) (1), and that by

(1) By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 6, where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise, and the payment of any costs ordered to be paid by the complainant or defendant in the case of any such complaint shall be enforced in like manner as such civil debt, and not otherwise.

By s. 21, A court of summary jurisdiction to whom application is made either to issue a warrant of distress for any sum adjudged to be paid by a conviction or order, or to issue a warrant for committing a person to prison for non-payment of a sum of money adjudged to be paid by a conviction, or in the case of a sum not a civil debt by an order, or for default of sufficient distress to satisfy any such sum, may, if the court deem it expedient so to do, postpone the issue of such warrant until such time and on such conditions, if any, as to the Court may seem just.

By s. 35, Any sum declared by this Act, or by any future Act to be a civil debt, which is recoverable summarily, or in respect of the recovery of which jurisdiction is given by such Act to a court of summary jurisdiction, shall be deemed to be a sum for payment of which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts: Provided as follows: 1, A warrant shall not be issued for apprehending any person for failing to appear to answer any such complaint; and 2, An order made by a court of summary jurisdiction for the payment of any such civil debt as aforesaid, or of any instalment thereof, or for the payment of any costs in the matter of any such complaint whether ordered to be paid by the complainant or defendant shall not in default of distress or otherwise, be enforced by imprisonment, unless it be proved to the satisfaction of such Court, or of any other Court of summary jurisdiction for the same county, borough, or

s. 45 he had no power to issue the warrant. Evidence of the offence was then adduced and application made that the defendant should be convicted in his absence under s. 145 of the Railways Clauses Consolidation Act, and a distress warrant issued forthwith under s. 146. The magistrate was willing to make an order for the payment by the defendant of the penalty, but held that he had no power since 42 & 43 Vict. c. 49, s. 35, to convict or to issue the warrant.

The defendant did not appear to shew cause.

R. S. Wright, in support of the rule. The only question is, whether the penalty imposed by s. 103 of the Railways Clauses Act, is a "sum of money claimed to be due on complaint to a court of summary jurisdiction" within s. 6 of 42 & 43 Vict. c. 49, and therefore a civil debt recoverable in a court of summary jurisdiction, for which provision is made in s. 35. Assuming that a "complaint" was made to the magistrate, the penalty was not a sum of money claimed to be due, for under the Railway Act it is not due until ascertained by the conviction. The proceeding to enforce the penalty is criminal, and results in a conviction and not merely in an order for payment of money. The imposition of a penalty makes the procedure criminal: *Mellor* v. *Denham* (1); *Reg.* v. *Whitchurch*. (2)

[FIELD, J.:—Under s. 145 of the Railway Act the penalty is recoverable "upon complaint."]

Yes, but the magistrate is to proceed as if upon information, while it is clear that s. 6 of the Summary Jurisdiction Act applies to sums of money which under the old law were recoverable under orders as distinguished from convictions, and which are not connected with any matter of a criminal character. Offences like the present are generally committed by strangers, and it is important to proceed promptly. This is good ground for supposing

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place, that the person making default in payment of such civil debt, instalments, or costs, either has or has had since the date of the order the means to pay the sum in respect of which he has made default and has refused or neglected, or refuses or neglects to pay the same. . . .

(1) 5 Q. B. D. 467.

(2) 7 Q. B. D. 534.

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that the legislature did not intend to interfere with the right under s. 146 to have a distress warrant issued forthwith.

Cur. adv. vult.

Dec. 20. The judgment of the Court (Field, J., and Cave, J.), was delivered by

FIELD, J. This, although in form a rule for a mandamus, is in substance a rule nisi calling upon Mr. Paget, the metropolitan police magistrate, to shew cause why he should not proceed with and determine a complaint preferred on behalf of the Great Western Railway Company against Thomas Clapham for the offence of having travelled in a carriage of the company without having paid his fare, with intent to avoid payment, and for which offence Clapham had by s. 103 of the Railways Clauses Consolidation Act of 1845 become liable "to forfeit to the company a sum not exceeding 40*s.*," and which forfeiture was by the 145th section of the same Act made recoverable by summary proceeding before two justices. By this section on complaint being made to any justice he is to issue a summons requiring the party complained against to appear before two justices; and upon appearance, or in his absence after proof of service, it is provided that it shall be lawful for any two justices to proceed to the hearing of the complaint (and that although no information in writing or in print shall have been exhibited before them), and upon proof of the offence to convict the offender, and upon such conviction to adjudge the offender to pay the forfeiture incurred, and by s. 146 the amount may be levied by distress, it being provided that the justices shall issue their warrant for that imprisonment forthwith (s. 147), if no sufficient distress can be had. Under this 145th section Gillingham accordingly made a complaint (without any written information), upon which the magistrate issued a summons. Clapham, however, did not appear at the return, and evidence having been given as to the offence, Mr. Paget was satisfied upon the evidence that the offence had been in fact committed, and he was willing to comply with so much of the 145th section as required him to adjudge the defendant to pay 40*s.*, but he declined to convict or issue a distress warrant, conceiving upon the best construction that he could put upon the

statute (which is not so clear as might be wished) that ss. 6 and 35 of the Summary Jurisdiction Act of 1879 had tied his hands, by substituting the provisions contained in those sections for those of the Act of 1845, and that he had no power under those circumstances to convict, or no discretion to issue a distress warrant forthwith, and as the applicant was not willing to accept a mere order for payment he declined to proceed any further. Under these circumstances the applicant obtained a rule for a mandamus to proceed (afterwards converted into a rule to shew cause why he should not proceed), that is to say, convict and issue a distress warrant.

Upon the argument before us Mr. Wright, on behalf of the applicant, contended that the provisions of s. 145 and of the following sections of the Railways Clauses Consolidation Act were unaffected by ss. 6 and 35 of the Summary Jurisdiction Act, 1879, and that it was the magistrate's duty, being satisfied as he was upon the evidence that the offence had been committed, to convict and adjudge the payment of such forfeiture not exceeding 40*s.* as he thought right, and forthwith to issue his distress warrant. Mr. Paget, in the affidavit, which he made by way of shewing cause against the rule, disputed this proposition, re-affirming the view he took at the hearing.

Now before proceeding to consider the meaning and effect of the Summary Jurisdiction Act of 1879, it will be well to review the previous state of the law affecting summary proceedings, in order the better to understand the scope and object of the enactments of the later statute. The code in reference to summary proceedings before justices was the Act of 1848, known as Jervis's Act, by which two modes of commencing proceedings are pointed out, first, exhibiting an information, and second, making a complaint. The distinction between them runs through the Act, but there is very little real substance in it, after whichever of them may have been adopted has performed its twofold effect of informing the defendant of the nature of the complaint against him and procuring or enforcing his appearance. For that reason they cease to be of any practical importance; see *Blake* v. *Beech*. (1) The proceedings continue throughout without reference to them or

(1) 1 Ex. D. 320.

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their respective natural results, that is to say, conviction or order for the payment of money, the first being in fact a criminal proceeding to end in fine or imprisonment, the latter a civil proceeding to enforce payment of a sum of money previously ascertained to be due.

Now the object of the Act of 1879 seems to me clearly to have been to soften the rigour of the mode of proceeding for a conviction for an offence, and to remove the remedy for nonpayment of money ascertained to be due out of the category of criminal procedure. Accordingly I find three series of sections, 1, those relating to indictable offences, with which at present we have nothing to do; 2, to convictions; and 3, to sums of money due which the statute (s. 6) defines to be "civil debts," and the question, therefore, in the present case is under which of the two latter heads does the recovery range itself. If under the first head, the remedies are found in ss. 4, 5, and other sections, if under the second head, ss. 6 and 35 prescribe the mode of procedure, s. 6 enacting that a sum claimed to be due and recoverable on complaint and not on "information" shall be a civil debt, and s. 35 that a "sum declared to be a civil debt" which is recoverable summarily, shall be deemed to be a sum for payment of which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Act. The question, therefore, really is whether, under Jervis's Act, the case now under consideration is one for which the defendant is liable by law upon summary conviction for the same to be imprisoned, fined, or otherwise punished, or whether it is one in which the justices have authority by law to make an order for payment of money. See 11 & 12 Vict. c. 43, s. 1. If the former, the result of conviction is not taken away, if the latter, all that the magistrate has power to do is to make an order for the payment which, in the present case, he was quite willing to do, and with great respect to the magistrate in the present case, whose experience and knowledge of his duties are so conspicuous, I am obliged to come to a different conclusion from that which he has arrived at. Now following the precise language of s. 6, 40*s.* or less is a sum of money, and it is a sum recoverable by s. 145 "on complaint" to a court of summary jurisdiction, and looking to the distinctions

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existing in Jervis's Acts, I am inclined to think that within the meaning of the Act of 1879 the 40*s.* or less was a sum of money which the legislature considered was not recoverable on information, but it seems to me that the "forfeiture" claimed here was not a sum of money claimed to be due "and recoverable" on complaint to a court of summary jurisdiction. It is true that the forfeiture presumably is forfeiture to the Great Western Railway Company, but that does not bring the case within the class of civil remedy, it still remains criminal: *Hearne* v. *Garton.* (1) A fine or penalty is matter of criminal and not civil procedure: *Mellor* v. *Denham.* (2) At the time of the hearing no sum of money was due to anybody, until the magistrate convicted and adjudged the amount, which might range from one farthing to 40*s.* The Great Western Railway Company did not claim any sum due to them, their claim was that the magistrate should convict, and if convicting, should adjudge the penalty at such amount as in his good judgment he should assess it. It therefore seems to me that the case does not fall within the 5th and 35th sections, and that it is the duty of the magistrate to convict, and that he must proceed thus far. I gather that when he has reached that stage some question may arise as to his duty to "issue a distress warrant forthwith." Now s. 21 of the Act of 1879 would seem to apply to a sum of money adjudged to be paid either on conviction or on order, and to vest in the magistrate a discretion as to issuing the warrant or postponing it, and upon terms and conditions as to time or otherwise. I understand Mr. Wright to argue that no such discretion existed in the present case, but not having the view of the magistrate before us upon that head, it does not seem to be advisable at present to express any view as to it. Mr. Wright said that in such a case as the present, where the offender may not be known or may be eluding punishment, it was not desirable to refuse the forthwith issue of the warrant, and that Mr. Paget is bound in a ministerial manner by it. If Mr. Paget in his discretion (which I am sure he will exercise with regard to all the circumstances of the case) issue the warrant forthwith no further question will arise. If he considers he has a discretion, and the applicant thinks it right to question it, that will form the subject

(1) 2 E. & E. 66. (2) 5 Q. B. D. 467.

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of fresh consideration when the Court will have before it the grounds of Mr. Paget's determination.

Case remitted to the magistrate.

Solicitor for prosecutor: *R. R. Nelson.*

A. P. S.

Dec. 20.

THE QUEEN *v.* EATON AND OTHERS, JUSTICES OF NORTHAMPTON. RE J. SHARPE. RE MARY MARRIOTT.

Elementary Education—Justices—Jurisdiction in Cases under the Elementary Education Acts—Union extending into several Counties—Attendance Order Elementary Education Act, 1876 (39 & 40 *Vict. c.* 79), *ss.* 12, 34; *Poor Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 106), *s.* 27.

The effect of s. 34 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79)—which incorporates for certain purposes all enactments relating to guardians and their officers—is to enable proceedings, before justices for non compliance with attendance orders and for breach of by-laws under the Elementary Education Acts, in cases where the parents proceeded against reside in a union extending into different counties, to be taken before the justices of either county.

RULE calling on C. Eaton and others, justices for the county of Northampton, to shew cause why a writ of mandamus should not issue directed to them, commanding them to hear and determine the matter of an application of W. B. Arnold, on behalf of the school attendance committee of the Stamford Union, for a summons against J. Sharpe, for a breach of the by-laws made and passed by the committee.

There was a similar rule for a summons against Mary Marriott.

Dec. 16. The justices shewed cause by affidavit, but no counsel were instructed.

W. Y. Clare, supported the rules.

The facts and arguments in support of the rules sufficiently appear in the judgment.

Cur. adv. vult.

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Dec. 20. The judgment of the Court (Field, J., and Cave, J.) was delivered by

FIELD, J. A rule nisi has been granted calling upon two of the justices of Northamptonshire to shew cause why they should not proceed to hear and determine an application, on behalf of the school attendance committee of the Stamford Union, for a summons against John Sharpe, and also, on motion of applicant, against Mary Marriott.

Both Sharpe and Marriott resided in the parish of Ryhall, in the county of Rutland, but within the union of Stamford, which union also comprises a part of the county of Northampton, within which the justices had jurisdiction in petty sessions at Stamford.

The proceedings against Sharpe were for a breach of the by-laws made under s. 74 of the Elementary Education Act of 1870, as amended by the Acts of 1876 and 1880, for, amongst other places, the parish of Ryhall. And the application against him was made under s. 12 of the Act of 1876, by which, when an attendance order is not complied with without any reasonable excuse, a court of summary jurisdiction may, on complaint made by the local authority, make such order as they think fit within the limits imposed by the statute. And the proceedings against Mary Marriott were made (so far as the question we have to decide) under similar circumstances.

It will have been observed that although the defendants in both cases committed the breaches complained of within the county of Rutland, the application was made to the justices in petty sessions in the county of Northampton. And the justices to whom the application was made, having been advised that they had no jurisdiction in cases under the Elementary Education Act of 1876, except in cases arising in their own county, declined to issue the summons.

There is, of course, no doubt that primarily the limits of the commission of justices are also those of their jurisdiction, and that it lies upon any one who asks them to act elsewhere to shew some statutory authority so to do. In the present case the school attendance committee of the union, whose duty it is to enforce

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the by-laws and the provisions respecting the employment of children, relied upon s. 34 of the Act of 1876 as giving that jurisdiction. By that section "all enactments relating to guardians and their officers and expenses, and to relief given by guardians, shall, subject to the provisions of this Act, apply as if the guardians, including the school attendance committee, were acting under the Acts relating to the relief of the poor, and the local government board may make rules, orders, and regulations accordingly." It is impossible to exaggerate the inconvenience of this mode of legislation. Instead of the legislature referring specially to any previous Acts, or sections of Acts, which it proposes to incorporate in this section, the only incorporation is that of "all enactments" relating to guardians, rendering it necessary therefore for any tribunal required to construe the Act to search through every Act of Parliament in which guardians are referred to, to see whether any particular enactment can be found bearing upon the matter in hand, and inasmuch as in this very Act there is a set of clauses expressly referring to "legal proceedings," I am not at all surprised that the justices in the present case, finding no extension of the jurisdiction in those clauses, conceived that it had not been given to them. In order, however, to make out that a Rutland jurisdiction had been conferred on the Northamptonshire justices, we were referred on behalf of the school attendance committee to 30 & 31 Vict. c. 106, s. 27, by which it is enacted that "where any union extends into several distinct jurisdictions, every matter, act, charge, or complaint by which the guardians are affected, or in which they have any interest, shall, for the purpose of jurisdiction, be deemed to arise or exist equally throughout the union," and I think it must be taken that, if that clause is to be read into s. 3 of the Elementary Education Act, and if, when so read in, s. 27 applies to the present case, the justices of Northamptonshire would have jurisdiction, although the matter of the complaint arose in Rutland; the marginal note to s. 27, pointing out as it does that the enactment is intended specifically to relate to "jurisdiction of justices in union."

Let us then see whether s. 27 of 30 & 31 Vict. is made applicable to the enforcement of by-laws made under the provisions of the Elementary Education Acts. The authority enforcing them

is "the school attendance committee," who are expressly mentioned in s. 34. They are "acting" under that Act, and the section says that "all enactments relating to guardians" shall apply as if the school attendance committee were acting under the Acts relating to the relief of the poor. 30 & 31 Vict. c. 106 is undoubtedly one of those Acts, and as the Stamford Union extends into the county of Northampton I think that the matter complained of here, although actually arising within the county of Rutland, must be deemed to have arisen equally in Northamptonshire, into which the union extends, and so within the jurisdiction of the Northamptonshire justices. There are many instances of similar legislation. For an offence committed in a workhouse a justice may commit to the gaol of the county, to a parish in which the pauper is chargeable (7 & 8 Vict. c. 101, s. 57), notwithstanding that the justices are not justices of that county: see 11 & 12 Vict. c. 110, s. 9. In like manner, under the various Public Works Consolidation Acts, if a question arise relating to lands not wholly in one jurisdiction they may be decided by a justice in any county in which any part of such land is situated, and an offence against the Salmon Fishery Acts committed in a river fixing the boundary of two counties is cognizable by any justice of either of them. The result therefore is, that the justices have jurisdiction in these cases, and must proceed. We make the rules absolute.

Rules absolute.

Solicitors for prosecutors: *Joseph Mote & Son, for English, Stamford.*

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Dec. 19.

[IN THE COURT OF APPEAL.]

ROSENBERG *v.* COOK.

Vendor and Purchaser—Conditions of Sale—Land over Railway Arch, &c—Ultrà vires Sale by Railway Company to Vendor—Sale of Possessory Title only—Forfeiture of Deposit on refusal to complete.

The defendant purchased from a railway company land over a tunnel, which, not being "superfluous," the company had no power to sell, and the plaintiff contracted to purchase the land from the defendant as freehold building land. One of the conditions of sale was that the title should commence with the conveyance from the company; another, that the purchaser should not require the production of, or investigate or make any objection or requisition in respect of, such conveyance; and another, that the purchaser should send his objection, if any, to the title within seven days from the delivery of the abstract. The plaintiff declined to complete after the expiration of the seven days, and sued for the deposit:—

Held, by the Court of Appeal (Jessel, M.R., and Brett and Cotton, L.JJ.), reversing the decision of Lindley, J., that the deposit could not be recovered.

APPEAL by the defendant from the judgment of Lindley, J., at a trial without a jury.

This was an action to recover a deposit of 65*l.* on a contract of sale by the defendant to the plaintiff of certain land described in the particulars of sale as "freehold building land situate on the east side of Victoria Street, Cable Street, St. George's-in-the-East, quite ready for building operations."

The land in question, which was bought after having been unsuccessfully put up for auction, and upon the conditions of sale drawn up for the auction, was partly situate over an arch of the East London Railway, and had been sold and conveyed to the defendant by the East London Railway Company.

The material conditions of sale were as follows:—

4. The title shall commence with the conveyance from the East London Railway Company to the vendor, and the purchaser shall not require the production of, or investigate, or make any objection or requisition in respect of such conveyance or the title prior to the date thereof, whether such title shall appear by reference, recital, statement, covenant for production or otherwise, or do not appear at all.

5. The purchaser shall examine the said conveyance, and send his objections and requisitions (if any) in respect of the title, or the abstract or particulars, or

anything appearing therein respectively, which shall be stated in writing, to the office of Mr. James William Cook, the vendor's solicitor, at No. 5, Mark Lane, in the City of London, within seven days from the date of the delivery of the abstract, and in this respect time shall be of the essence of the contract, and in default of such objections and requisitions (if none) and subject to such (if any) shall be deemed to have accepted the title, and if the purchaser shall insist on any objection or requisition as to the title or abstract, or evidence of the title, particulars, conditions, conveyance or otherwise, which the vendor shall consider himself unable or shall be unwilling to remove or comply with, the vendor may, by notice in writing to be given to the purchaser or his solicitor, at any time and notwithstanding any negotiation or litigation in respect of such objection or requisition, annul the sale, and shall thereupon return to the purchaser his deposit, and without interest, cost of investigating the title, or other compensation or payment whatsoever.

7. The property is sold subject to certain covenants, stipulations, and provisions as to the mode of use of the premises and certain rights of the East London Railway Company contained in the said conveyance, and the purchaser at this present sale shall in his conveyance enter into a covenant with the present vendor to observe the same, and to indemnify the present vendor against any breach thereof. A copy of such covenant, stipulations, and provisions will be produced at the time of sale, and may in the meantime be inspected at the office of the vendor's solicitor, and the purchaser shall be deemed to purchase with a full knowledge and acceptance thereof, and no objection or requisition shall be made in respect thereof.

Lastly, if the purchaser shall fail to comply with the above conditions his deposit shall be forfeited, and the vendor shall be at liberty to resell the property at such time and in such manner and subject to such conditions as he shall think fit, and any deficiency in price which may happen thereon, and all expenses attending the resale, shall immediately afterwards be paid by the purchaser to the vendor, and in case of non-payment, be recoverable by the vendor as liquidated damages.

The conveyance contained a condition enabling the railway company to resume possession of the land at any time on making compensation to the owner. An abstract thereof was furnished to the plaintiff's solicitor, who made no objection or requisition in respect thereof till after the expiration of the seven days, when he objected that the conveyance was void on the authority of *In re Metropolitan District Ry. Co. and Cosh* (1), so that the defendant could make no title at all to the land, and declined to complete. The defendant contending that the plaintiff was bound by the conditions, and proceeding to forfeit the deposit, this action was brought to recover it.

At the trial, Lindley, J., gave judgment for the plaintiff, on the

(1) 13 Ch. D. 607.

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ground that *In re Metropolitan District Ry. Co. and Cosh* (1) was applicable to the case; that the defendant had purported to sell a freehold but had only sold a revocable licence, if even that, so that there was no identity between the thing offered for sale and the thing sold.

The defendant appealed.

Harrison, Q.C., and *Eady*, for the defendant. It was, no doubt, held by the Court of Appeal in *In re Metropolitan District Ry. Co. and Cosh* (1), that a railway company have no power, under s. 127 of the Lands Clauses Consolidation Act, 1845, to sell vacant space over an arch as "superfluous land," and that a contract for the sale of such a space will be rescinded on the application of a purchaser. But that case cannot govern this. There was a full disclosure here of the state of the defendant's title, and the plaintiff had every opportunity of knowing, and did know, what he was buying from the defendant. The plaintiff, therefore, is barred by the 7th condition, and is bound to take the imperfect title which is disclosed as imperfect in the particulars.

Philbrick, Q.C., and *Tindal Atkinson*, for the plaintiff. The question is whether the defendant had what he purported to sell, and it is submitted that he had not. He purported to sell freehold land ready for building operations, and what he had was only a revocable licence to go on freehold land. The conditions as to time apply to objections as to the degree of the title: here there is a want of title altogether, and a total failure of consideration. *Best* v. *Hamand* (2), in which it was held that a purchaser from a railway company having a defective title might protect himself on a resale by special conditions, is distinguishable on the ground that the conditions in that case were more stringent than in this. The defendant had entered into an implied contract that he had some kind of title by barring investigation. The plaintiff was entitled to assume that the special Act of the railway company contained power to sell the land.

JESSEL, M.R. In this case the vendor, believing that he had acquired a title from the railway company to the strip of ground which is the subject of the action, put it up for sale upon con-

(1) 13 Ch. D. 607. (2) 12 Ch. D. 1.

ditions, one of which precluded objections being taken after the expiration of seven days from the delivery of the abstract of title. By the operation of these conditions the purchaser became aware of the conveyance under which the vendor held. He knew, therefore what he was buying; he knew that he was buying land capable indeed of supporting buildings, but having a railway tunnel underneath it. But as the railway company had no power to convey this land, the purchaser from the company, when he resold it, had only bare possession, and upon this ground an objection was taken to the title. It is said that this objection was taken too late, and that is the question with which we have to deal.

Now the title of the disseisor is in this country a freehold title, and therefore, although the vendor had a very bad title, and a title liable to be defeated, he had still a title good against all the world, except against those who might be proved to have a better one. It is suggested that because the company have no statutory power to convey, therefore no title can be acquired from them. But that is not the effect of the statute. There is nothing in the statute to the effect that the land shall not be devoted to any other purpose than that of a railway, or that possession cannot be taken from a railway company. The simple fact is that the vendor had a possession in this case, so that a fair sale of that possession is perfectly good.

BRETT, L.J. It seems to me that the objection was taken too late. I think my Brother Lindley's judgment proceeded on the ground that the defendant had not possession of anything which would correspond with what he professed to pass to the plaintiff. Now, if the defendant had had nothing, or if he had had only a revocable licence or easement, then, as he professed to sell freehold land, what he professed to sell would not correspond with that which the plaintiff bought, and I think my Brother Lindley proceeded on the ground that he had a revocable licence. If this had been so, I should have agreed. But, on consideration, I think that the defendant had more than an easement or a revocable licence. He had possession of all the land above the tunnel. But it is said that this was really no possession at all, on the ground

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that the railway had no power to give it, because an actual possession for any number of years would not give a title against the company. I do not agree with this, because I think that such a possession would give a title, but the point is one which it is not necessary to decide. The defendant had a possession of some kind, and he assumed to sell it by a right similar to that of a disseisor or a trespasser. The objection taken, therefore, was an objection to title, and was taken too late.

COTTON, L.J. The first question is, did the vendor propose to convey what the particulars describe. I think that if the particulars stood alone he probably did not. But looking to the reference to the conveyance from the railway company, which the purchaser was at liberty to inspect, I think that there was sufficient description, and that what the vendor proposed to convey was the physical possession of the land described in the particulars. The second question is, whether the fact that this physical possession was acquired by a void conveyance, ought to enable the purchaser to recover his deposit. That the conveyance was ultra vires and void, has been already settled by *In re Metropolitan Ry. Co. and Cosh.* (1) But that is a question of title: the purchaser was bound to know the law, and might have satisfied himself by inquiry whether the company had any special powers. Both parties having assumed that the company had the power to convey, it cannot now be inquired whether the conveyance was void or not. The vendor had an actual possession, and there is nothing in the statute to say that he had not a saleable possession, nor that the land shall not be appropriated to any other purpose than that of a railway. All that the legislation on the subject amounts to is, that the railway company shall not appropriate it to any other purpose. It does not seem necessary to decide whether or not the vendor had sufficient possession to ripen into a title under the Statute of Limitations, but if it were necessary, I should decide that he had.

Appeal allowed.

Solicitors for plaintiff: *Stones, Morris, & Stone.*
Solicitor for defendant: *J. W. Cook.*

(1) 13 Ch. D. 607.

J. E. H.

Referred to. TIMS c. JOHN LEWIS & CO. LD. [1951] 2 K. B. 459

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Dec. 9.

Malicious Prosecution — Reasonable and Probable Cause — Onus of Proof — Direction to Jury.

9 QBD 378. 11 QBD. 679

At the hearing of a plaint in a county court to recover rent the tenant's son was called as a witness, and swore that he had given up the key of the premises to the landlord before the rent accrued due. The landlord denied this, and subsequently prosecuted the witness for perjury. He was acquitted, and brought an action against the landlord for malicious prosecution. At the trial the plaintiff and defendant repeated their evidence as to the key, and the judge directed the jury alternatively that if they could not arrive at a conclusion as to which of the parties was speaking the truth, the plaintiff had not made out his case, and the defendant was entitled to a verdict; and that if they thought the plaintiff did give up the key, but the defendant owing to a defective memory had forgotten the occurrence and went on with the prosecution honestly believing that the plaintiff had sworn falsely and corruptly, then the jury would not be justified in saying that the defendant maliciously and without reasonable and probable cause prosecuted the plaintiff, and the defendant would be entitled to their verdict:—

Held, that the direction was right.

ARGUMENT of rule for a new trial, on the ground of misdirection, obtained by the plaintiff in an action for malicious prosecution.

Willis, Q.C., and *Macleod*, shewed cause.

Grantham, Q.C., and *Agabeg*, supported the rule.

The facts and arguments are sufficiently stated in the judgment.

Cur. adv. vult.

Dec. 9. The judgment of the Court (Huddleston, B., and Hawkins, J.) was delivered by

HAWKINS, J. This is an action for malicious prosecution. It was tried before my Brother Huddleston at Westminster on the 20th of June last. The verdict was for the defendant. Subsequently the plaintiff obtained a rule nisi for a new trial on the grounds, first, that the learned Baron misdirected the jury, and, 2ndly, that the verdict was against the weight of evidence. This rule was argued before my Brother Huddleston and myself on the 7th of November; and I have now to deliver judgment upon it.

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The defendant was the landlord of a house in the Belgrave Road, St. John's Wood. The father of the plaintiff was tenant of that house. In the month of February, 1879, an action which the defendant had brought in the county court against the father for rent alleged to be in arrear and to have accrued due after the month of December, 1877, came on to be tried before the county court judge. The defence set up was that before any rent became due, namely on the 17th of December, 1877, there was a surrender of the tenancy, and that on that day, in completion of the surrender, and by way of giving up possession of the premises, the key of the house was delivered to and accepted by the defendant. To support this defence the plaintiff was called as a witness for his father, and swore that he, on the last-mentioned day, at the request of the defendant, gave him up the key. Of the materiality of this statement there could be no doubt. After the determination of the county court action the defendant indicted the plaintiff for perjury at the Central Criminal Court. On the trial of that indictment the plaintiff was acquitted. He then commenced this action for malicious prosecution. On the trial before my Brother Huddleston the plaintiff repeated the evidence he had given at the county court. On the other hand the defendant on his oath expressly denied the truth of the statement, and in confirmation of his own testimony referred to his diary and other corroborating circumstances to which it is not necessary to allude more particularly. The result I have already stated.

I proceed now to deal with the action for a new trial, and first with the alleged misdirection.

In summing up the case the learned Baron told the jury that if the plaintiff had satisfied them he was telling the truth—that he really did give up the key—and that the defendant, knowing he had done so, indicted him for perjury, the plaintiff would be entitled to their verdict. On the other hand, he told them that if they believed the statement on oath by the plaintiff was untrue, and that he made it knowing it to be so, the defendant was justified in the course he took. To neither of these propositions could any objection be made. The learned Baron also told the jury that if in substance they believed the plaintiff's version their verdict ought to be for him, but that if they thought the

defendant was speaking the truth he was entitled to their verdict. To this too most properly no objection was taken; although no doubt as an abstract proposition the plaintiff might have spoken the truth, and still the defendant for reasonable cause might have believed him to be guilty. So, on the other hand, the defendant might have spoken the truth as to the key, and yet have had no reason to suppose the plaintiff's oath to the contrary was other than the result of innocent forgetfulness.

The learned Baron's direction however must be construed, as the summing up of a judge always ought to be, in connection with the particular circumstances of the case then before him. In the present case those circumstances were such that it was difficult to suppose either of the parties in giving his evidence could be labouring under any mistake.

The learned Baron, however, thought it right to provide for an alternative view of the case, viz., the event of an inability on the part of the jury to agree upon either of the questions so submitted to them; he accordingly told them that if they thought the matter was left in such doubt that they could not arrive at a conclusion as to which of the parties was speaking correctly, then they were left in this position: that the plaintiff had not made out his case to their satisfaction, and the defendant would be entitled to their verdict.

The learned Baron then proceeded to present another alternative view to the jury, and told them that it might be they would come to the conclusion that the plaintiff did in fact deliver up the key as he swore; and that the defendant had a very treacherous memory, and had forgotten all about it, and went on with the prosecution under the impression that he never had the key; nevertheless, if that was an honest impression, the upshot of a fallacious memory, and acting upon it he honestly believed the plaintiff had sworn falsely and corruptly, no jury would be justified in saying the defendant maliciously and without reasonable or probable cause prosecuted the plaintiff, because the best probable and reasonable cause would be that he honestly believed it. With this direction the case was left to the jury, who returned a general verdict for the defendant. Upon the point of misdirection, Mr. Grantham, for the plaintiffs, confining his objections to the two

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latter alternatives, argued that as the verdict was a general one, and it was uncertain whether it was based upon the belief of the jury in the defendant's version or upon one of these alternatives, there ought, if either of his objections was sustained, to be a new trial. In this I think he was right. It becomes, therefore, necessary to consider these objections separately. The first was to the learned Baron telling the jury that if they were left in doubt their verdict should be for the defendant. I think this direction is not open to exception. To succeed in an action for malicious prosecution, the plaintiff must allege and establish two things—absence of reasonable and probable cause, and malice. The affirmative of these allegations is upon him. Failing to establish both of them, he fails altogether. It is an essential element in his case that the jury should, under the judge's direction as to what facts will suffice for that purpose, find affirmatively the non-existence of probable cause, and they have no right to assume it without proof. If on the trial of such an action the plaintiff were to offer no other evidence than that the defendant caused him to be indicted, even from the most vindictive motives, the defendant would be entitled to a verdict: (see *Mitchell* v. *Jenkins* (1), per Parke, J.) In this respect the action for malicious prosecution does not differ from any other action in which the plaintiff is called upon to prove his case. If further authority on this point were necessary, it is to be found in the dictum of Lord Colonsay in *Lister* v. *Perryman*. (2) With regard to that dictum, however, I must observe that in uttering it the learned lord must have been under the impression that the action under consideration was for a malicious prosecution, whereas it was for false imprisonment, there being this recognised distinction between the two actions, that in false imprisonment the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification, whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence. With regard to the last alternative presented to the jury, Mr. Grantham contended, as a general proposition, that where a defendant relies upon his own memory for the facts which go to make up probable cause, he must prove to the satisfaction of the

(1) 5 B. & Ad. 594. (2) Law Rep. 4 E. & I. 542.

jury that his memory of the facts is accurate, and, if he fails to do so, he must be taken in law to have acted without that reasonable or probable cause which the facts, if true, would have established. In other words, he contended that, giving a defendant full credit for honesty, if he relies upon his own memory for his justification, he must stand or fall by its accuracy, and, applying this general proposition to the present case, he argued that the learned Baron ought to have told the jury that, if they believed the plaintiff did in fact deliver the key to the defendant, and the defendant unfortunately acted upon a fallacious memory, and in forgetfulness of the circumstance which once was clearly within his knowledge, and which forgotten circumstance would, if recollected, have established a clear want of reasonable and probable cause, his belief in the accuracy of his memory and in the guilt of the plaintiff, however conscientious, would not afford him justification or excuse. In support of his argument he cited the case of *Turner* v. *Ambler* (1), and moreover he informed us that Mr. Justice Denman and Baron Pollock had virtually so ruled. I do not assent to this proposition; I do not find in the case cited anything which favours it, and I have the best reason for saying that my Brothers Denman and Pollock have been altogether misunderstood.

That brings me to the consideration of what is reasonable and probable cause.

Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to

(1) 10 Q. B. 252.

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believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused.

The belief of the accuser in the guilt of the accused; his belief in the existence of the facts on which he acted, and the reasonableness of such last-mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts from which the judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause. This also is an inference of fact, not of law as is sometimes erroneously supposed; and the judge is to draw it from all the circumstances of the case: *Lister* v. *Perryman* (1), per Lords Chelmsford and Westbury. This inference is certainly not to be interfered with upon lighter grounds than if it had been intrusted by law to the jury. In practice, everybody knows the judge may, and often does, anticipate the findings of the jury alternatively in summing up, as the learned Baron did in this case.

If in the case now under discussion the jury found their verdict for the defendant upon the last alternative presented to them by the learned Baron, I think the undisputed circumstances were such that they must be taken to have found that in fact the plaintiff was not guilty, but that an honest and reasonable belief was entertained by the defendant to the contrary, and in the existence of facts which, if true, justified that conclusion. True it is, that, according to the hypothesis involved in the last alternative, the defendant's belief in the one great fact mainly relied on by him, namely, that the key was not delivered to him by the plaintiff, must have been found by the jury to be erroneous, and the supposed fact to have had no real existence. It does not, however, follow, that because the supposed fact had no real existence the belief was unreasonable. Yet this is what Mr. Grantham in substance contended for. Let us consider this for a minute or two. If a man has never seen reason to doubt, but on the contrary, has ever had reason to trust, the general accuracy of his memory, and that memory presents to him a vivid apparent recollection that a particular occurrence took place in his presence within a recent period of time, is it not reasonable to believe in the existence of

(1) Law Rep. 4 E. & I. 535, 538.

it? The more especially if, as in the present case, his diary and other surrounding circumstances, appear to confirm his memory. What more reasonable ground can be suggested for a belief that any particular act was done than the conviction of the person believing that he remembers it as having been done in his presence before his own eyes? Would it not under such circumstances, be most unreasonable, if not impossible, to disbelieve?

Mr. Grantham admitted (indeed it was impossible to dispute it, for a long roll of authorities, notably among them *Lister* v. *Perryman* (1), might be cited to establish the proposition), that a person may reasonably institute a prosecution solely upon information given to him by another, and which he honestly believes to be true. What does this admission, coupled with his argument, amount to? That a prosecutor may trust—provided he knows no ground for distrust—the memory of another, but may not give credit to his own. I cannot recognise such a distinction either in law or common sense, and no authority, as far as I know, can be found to warrant it. The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable bonâ fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of—no matter whether this belief arises out of the recollection and memory of the accuser, or out of information furnished to him by another. It is not essential in any case that facts should be established proper and fit and admissible as evidence to be submitted to the jury upon an issue as to the actual guilt of the accused. The distinction between facts to establish actual guilt and those required to establish a bonâ fide belief in guilt should never be lost sight of in considering such cases as that I am now discussing. Many facts admissible to prove the latter, would be wholly inadmissible to prove the former.

It cannot of course be laid down as an abstract proposition that an accuser is justified in acting either upon the credited statement of an informant, or upon his own memory. The question must always arise according to circumstances whether it was reasonable to trust either the one or the other. A person who acts upon the

(1) Law Rep. 4 E. & I. 521.

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information of another, trusts the veracity, the memory, and the accuracy of that other, in each of which he may be completely deceived. His informant's veracity may be questionable; his memory fallacious; and his accuracy unreliable. Yet it does not follow that it was unreasonable to believe in his information if he never had cause to doubt him. In like manner a man may be deceived by his own memory, yet it does not follow that it was unreasonable to trust it, if he never before knew it to be defective. Why, I ask, if he may rely on the memory of another, may he not rely upon his own? The reasonableness or otherwise of this reliance, I have already said, it is for the jury to determine. If the informant were known by the accused to be a person in whose veracity, memory, power of observation and accuracy no confidence could be placed, no jury I should think would hesitate to find that a belief based solely upon information from such an informant was unreasonable. The same observation would apply if an accuser acted wholly upon the information of his own memory knowing that it was untrustworthy.

In short, it would be unreasonable to rely either on an informant known to be untrustworthy, or a memory known to be unreliable, without substantial confirmation, especially where the liberty of another is concerned.

I am of opinion, then, that there was no misdirection, and this being so, the jury, under the learned Baron's direction, must be taken to have found that absence of reasonable cause was not established, and the verdict was rightly returned for the defendant.

Under these circumstances, it becomes unnecessary to consider the question of malice: *Mitchell* v. *Jenkins*. (1) I cannot, however, refrain from referring to an argument of Mr. Grantham, that if the learned Baron ought to have told the jury there was want of reasonable cause that of itself was evidence of malice. I do not agree in this. It is true, as a general proposition, that want of probable cause is evidence of malice; but this general proposition is apt to be misunderstood. In an action of this description the question of malice is an independent one—of fact purely—and altogether for the consideration of the jury, and not at all for the

(1) 5 B. & Ad. 588.

judge. The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act (see *Bromage* v. *Prosser* (1) per Bayley, J.), but malice in fact—malus animus—indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. In order to arrive at a conclusion on the question, the jury are to take into consideration all the circumstances of the case, and to form their own opinion upon them uninfluenced by any opinion of the judge unless that opinion accords with their own view. If among the circumstances it appears to the jury that there was no reasonable ground for the prosecution, they may—though by no means bound to do so—well think that it must have been dictated by some sinister motive on the part of the person who instituted it. Absence of reasonable cause, to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the judge upon that point if it differed from their own—as it possibly might, and in some cases probably would—as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the judge of the duty of determining for himself the question of reasonable cause as an essential element in the case. Want of reasonable cause is for the judge alone to determine, upon the facts found, for the jury; as evidence of malice it is a question wholly for the jury, who, even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bonâ fide believed to be right in the interests of justice—in which case they ought not, in my opinion, to find the existence of malice: *Mitchell* v. *Jenkins* (2); *Turner* v. *Ambler* (3); *Lister* v. *Perryman* (4) per Lord Westbury.

It is an anomalous state of things that there may be two different and opposite findings in the same cause upon the

(1) 4 B. & C. 255.
(2) 5 B. & Ad. 588.
(3) 10 Q. B. 252, 254.
(4) Law Rep. 4 E. & I. 538.

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question of probable cause—one by the jury and another by the judge, but such at present is the law.

With regard to that part of the rule which complains that the verdict was against the weight of evidence, my Brother Huddleston thinks the verdict was right. Having considered the whole case I am of the same opinion. This rule, therefore, fails upon every point, and must be discharged.

Rule discharged.

Solicitors for plaintiff: *W. J. Child & Son.*
Solicitor for defendant: *G. W. Robinson.*

W. A.

1881
Dec. 9.

[IN THE COURT OF APPEAL.]

SOLOMON *v.* BITTON.

Practice—New Trial—Verdict against Evidence—Principle on which New Trial allowed.

The question whether a new trial should be granted on the ground that the verdict was against the weight of evidence, must depend upon whether the verdict was such as reasonable men ought to have given, and not upon whether the learned judge who tried the action was dissatisfied or not with the verdict.

THIS was an action of trover tried before Lindley, J., at the Middlesex Trinity Sittings, 1881, in which the evidence was very conflicting, and the question substantially left to the jury was whether they believed the plaintiff's or the defendant's witnesses. The jury found a verdict for the plaintiff. The defendant applied afterwards for a new trial on the ground that the verdict was against the weight of evidence and the Divisional Court (Grove, Lindley, and Lopes, J.J.) made an order for a new trial, the learned judge who tried the cause expressing himself to be dissatisfied with the verdict.

The plaintiff appealed.

McIntyre, Q.C. (*Grantham, Q.C.*, and *S. Woolf*, with him), for the plaintiff.

Ballantine, Serjt., and *Cooper Wyld*, for the defendant.

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SOLOMON v. BITTON.

THE COURT (Jessel, M.R., and Brett and Cotton, L.JJ.), reversed the order appealed from, saying that the rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence, ought not to depend on the question whether the learned judge who tried the action was or not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to.

Order reversed.

Solicitor for plaintiff: *Alfred James.*
Solicitor for defendant: *A. Silberberg.*

W. P.

DURRANT *v.* RICKETTS AND WIFE.

Jan. 12.

Practice—Married Woman, Judgment against—Order XIV., rule 1*—Form of Order.*

An order having been obtained under Order XIV., rule 1, for leave to sign final judgment against a married woman in an action for the price of goods supplied to her during coverture:—

Held, that the order was wrongly made, inasmuch as there can be no judgment against a married woman personally in respect of such a claim.

APPEAL against the order of a judge at chambers giving leave to sign final judgment against the female defendant under Order XIV., rule 1.

The action had been originally brought against the female defendant, a married woman, alone. The claim endorsed on the writ was for the price of goods supplied to the female defendant, such goods having been supplied to her during coverture, but while she was living apart from her husband. The writ was subsequently amended by joining the husband as a defendant. The plaintiff applied to sign judgment against the female defendant for the full amount of the claim and costs under Order XIV., rule 1. The master refused leave to sign judgment, but the judge reversed his decision, and made an order that the plaintiff should be at liberty to sign final judgment against the female defendant for the amount endorsed on the writ, and costs.

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DURRANT v. RICKETTS.

Lumley Smith, Q.C., moved by way of appeal against the judge's order. It is submitted that, according to the practice, the order giving leave to sign final judgment in the action against the married woman was wrong. There was never in equity, nor is there now at law, any judgment against the married woman personally in respect of a liability contracted during coverture. The practice is to order an inquiry as to the existence of separate estate chargeable with the sum claimed, and to declare that such separate estate, if any, is chargeable therewith: *Picard* v. *Hine* (1); *Pike* v. *Fitzgibbon*. (2)

[FIELD, J. It is clear that the order as at present framed cannot stand; there must have been some misapprehension on the part of the judge at chambers as to the form of order applied for.]

Brynmôr Jones, shewed cause. The claim is not disputed, and it is clear upon the affidavits that the separate estate ought to be charged, if there be any such estate chargeable, with the amount of the claim. The error in the order is one of form rather than substance. He cited *Collett* v. *Robinson*. (3)

[FIELD, J. We will give the plaintiff an order in the form in accordance with the decision in *Pike* v. *Fitzgibbon* (2), as we understand that there is no real dispute between the parties as to the claim, but the plaintiff must pay the costs of the application in this Court and at chambers.] (4)

THE COURT (Field, J., and Huddleston, B.) directed that the order should be varied accordingly.

Order varied accordingly. (5)

Solicitor for plaintiff: *W. J. Fraser.*
Solicitors for defendant: *G. S. & H. Brandon.*

(1) Law Rep. 5 Ch. 274.
(2) 17 Ch. D. 454.
(3) 26 W. R. 403; 11 Ch. D. 687.
(4) The counsel for the defendant said nothing in opposition to the variation of the order as suggested.
(5) See *Atwood* v. *Chichester*, 3 Q. B. D. 722.

E. L.

THE INCE HALL ROLLING MILLS COMPANY, LIMITED, PLAINTIFFS; THE DOUGLAS FORGE COMPANY, DEFENDANTS

1882
Jan. 17.

Company—Compulsory Winding-up—Goods delivered after Commencement of Winding-up in pursuance of Contract entered into before — Set-off — Companies Act, 1862 (25 & 26 *Vict. c.* 89.)

In an action by a limited company in the course of compulsory winding-up by the Court for the price of goods supplied to the defendants by the company after, but in pursuance of a contract entered into before the commencement of the winding-up, i.e., the presentation of the petition for winding-up, such contract not being a sale of specific goods :—

Held, that the defendants could not set off a debt from the plaintiffs to themselves incurred prior to the commencement of the winding-up.

FURTHER CONSIDERATION before Watkin Williams, J.

The nature of the case and the facts sufficiently appear from the judgment.

Gully, Q.C., and *Crompton*, for the plaintiffs.

C. Russell, Q.C., and *French*, for the defendants.

The following authorities were referred to in the course of the argument : *In re Sankey Brook Coal Co.* (1) ; *Re Progress Assurance Co.* (2) ; *Anderson's Case* (3) ; Buckley on Joint Stock Companies, 3rd ed. 287 ; Lindley on Partnership, 4th ed. 1321.

Cur. adv. vult.

Jan. 17. WATKIN WILLIAMS, J. The question in this case, stated broadly, is, whether, in an action brought by a limited company in the course of compulsory winding-up by the Court for the recovery of the price of goods delivered by the company after the commencement of the liquidation, but in execution of a contract entered into before liquidation, it is competent to the defendant to set off against this debt a debt due to him from the company incurred prior to the liquidation.

The action came on for trial before me at Liverpool without a jury, being taken principally upon admissions made upon the trial

(1) Law Rep. 6 Ex. 185. (2) 22 L. T. (N.S.) 430.
(3) Law Rep. 3 Eq. 337.

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in Court, it being stated by the counsel that there were no facts in dispute.

This judgment has been delayed under an impression that the identical question here raised had arisen in another case awaiting decision before the courts. That case has been since determined, but apparently upon different grounds, and I therefore proceed to dispose of this case. The facts as presented before me at the trial are as follows:—

The statement of claim alleged that the plaintiffs, who had carried on business as iron rollers at Ince, near Wigan, were being wound up compulsorily under a petition presented on the 24th of November, 1880, the order for winding-up being dated the 4th of December, 1880. That about the 26th of November, 1880, the plaintiffs supplied, and sold and delivered to the defendants certain iron, the price of which amounted to the sum of 108*l.* 12*s.* 1*d.*, and that on the 9th of December, 1880, the plaintiffs supplied, sold, and delivered to the defendants another lot of iron, the price of which amounted to 108*l.* 5*s.* 11*d.*, and the plaintiffs claim these two sums, amounting to 216*l* 18*s.*, with interest. The statement of defence admitted the indebtedness of the defendants to the plaintiffs' company in respect of these two sums, but alleged that the contract, in fulfilment of which the goods were delivered, had been entered into between the defendants' and the plaintiffs' company before the petition for winding up, viz., on the 19th of November, and they claimed a right to set off against this debt the price of certain goods previously sold and delivered by them to the plaintiffs, and for which they held the plaintiffs' dishonoured acceptances, one for 177*l.* 1*s.*, due on the 13th of November, 1880, and the other for 122*l.* 16*s.* 9*d.*, due on the 13th of January, 1881.

The plaintiffs, in their reply, denied the defendants' allegations, and they further alleged that the contract and transaction as relied upon by the defendants were void as against the liquidators under the winding-up.

At the trial the following facts were either proved or admitted:

The plaintiffs had carried on business as iron rollers, and the defendants that of forging castings and making machinery, and of buying and selling iron. The plaintiffs and defendants had had

dealings together for five or six years, and during the whole of that time the defendants had bought from and sold iron to the plaintiffs. In June, 1880, the defendants sold and delivered to the plaintiffs a quantity of iron, the price of which amounted to 177*l.* 1*s.*, and on the 10th of July, 1880, they drew upon the plaintiffs for that amount at four months, and the plaintiffs accepted the same, the bill falling due on the 13th of November, 1880. In the September following, the defendants sold and delivered to the plaintiffs a further lot of iron, and, in like manner, on the 10th of October, 1880, drew upon the plaintiffs for 122*l.* 16*s.* 9*d.*, at three months, for the price of the same, and the plaintiffs accepted the bill, which would be due on the 13th of January, 1881.

It is the amount of these bills that the defendants seek to set off against the price of the iron bought by them from the plaintiffs as presently mentioned. On the 18th of November, 1880, the plaintiffs' acceptance for 177*l.* due on the 13th of November, came back to the defendants dishonoured. On the morning of the 19th of November one of the defendants' firm went to the office of the plaintiffs, and there saw Mr. Kay, with whom he usually transacted such business, and informed him that they were in the market for iron, and would send in to him a specification for him to quote, this being the usual way in which their contracts for iron were made, and at the same time the price of 5*l.* 15*s.* per ton was verbally quoted. In the course of the day the defendants sent in a specification in their usual form for 60 tons of various sizes of rolled iron, requesting the plaintiffs to supply the iron "at per your quotation this morning, viz. 5*l.* 15*s.* per ton, on trucks, usual terms." To this the plaintiffs replied on the same day, stating that their price for the specification was 5*l.* 15*s.* per ton usual terms. This contract (which I find out now is the material thing on which my judgment turns) did not amount to a bargain and sale of specific goods, and created no debt between the parties.

It amounted to no more than an executory contract to supply, sell, and deliver on the one side, and to accept on the other, certain quantities of unascertained goods at a future day.

If it is material, the defendants were undoubtedly aware at this

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time that the plaintiffs were in failing circumstances, and being creditors of the plaintiffs, undoubtedly gave this order with a view of covering their debt.

On the 24th of November, 1880, the plaintiffs' company being in insolvent circumstances, a creditor petitioned the Court for a compulsory winding-up of the company. On the 4th of December an order for the winding-up was made, and Robert Thompson was appointed provisional official liquidator. On the 6th of December the liquidator took possession of plaintiffs' works. On the 10th of December an order was made authorizing the liquidator to carry on business for the purpose of winding up. In the meantime, viz. on the 25th of November, the defendants applied for and took delivery from the plaintiffs, under the contract of the 19th of November, of about eighteen tons of iron, which was invoiced to them at 5*l.* 15*s.*, making 108*l.* 12*s.* 1*d.*, which is the first item sued for in this action. On the 8th of December the defendants in like manner applied for and took delivery of a further quantity, the invoice for which amounted to 108*l.* 5*s.* 11*d.*, being the second item sued for in this action; the two quantities amounting to thirty-seven tons fourteen cwts. out of the sixty tons.

Shortly after this date a discussion arose between Mr. Thompson, the liquidator, and the defendants as to the right of the liquidator to be paid in full for this iron without giving the defendants credit for their set-off, and on the 14th of December, 1880, the liquidator wrote to the defendants as follows:—"Dear Sirs,—Your contract with this company of the 19th ult. was for sixty tons of iron at 5*l.* 15*s.* per ton. Of this quantity I have delivered about thirty-seven tons fourteen cwt., and shall expect to be paid in full for all deliveries since the date of the liquidation, 23rd of November. Is it your wish that I should complete the contract on the above-mentioned basis?" To this the defendants replied on the 16th of December as follows:—"Dear Sirs,—We decline to receive the balance of iron due to us under contract with the Ince Hall Company on the terms set forth in your letter of the 14th inst." And there the matter stands. No further iron was delivered, and the liquidator having now sued in the name of the company for the price of the iron delivered upon the 25th of November and the 8th of December, amounting to 216*l.* 18*s.*, the question is whether

the defendants have a right to set off the amounts due to them from the plaintiffs upon the plaintiffs' two dishonoured acceptances, or, which comes to the same thing, the price of the goods sold and delivered by the defendants to the plaintiffs before the commencement of the winding up.

There is no dispute about the facts as above stated. The defendants are clearly indebted to the plaintiffs' company now in liquidation in the two sums of 108*l.* 12*s.* 1*d.* and 108*l.* 5*s.* 11*d.*, for the price of goods contracted for before the commencement of the winding up, that is before the date of the petition, but not delivered to them until after the commencement of the winding-up; and as to the second lot not until after the order for winding-up. It is equally clear that the plaintiffs' company are indebted to the defendants in a larger sum of money for the price of goods sold and delivered by the defendants to the plaintiffs before the commencement of the liquidation, and the sole question is, whether, under the above circumstances, the defendants are entitled to set off the latter claim against their debt due to the company in liquidation. The plaintiffs and defendants stand in a perfectly independent relation to each other, and the ordinary rules of set-off apply to this case. It seems to me also that it may be admitted for the purposes of this case that the mere fact, that the debts or either of them which it is sought to set-off one against the other, do not, or does not become payable until after the commencement of the liquidation, does not interfere with the right of set-off, provided that the debts are, in substance and in fact, mutual debts, to and from the same parties and in the same interest. And it seems to me that the rights of the parties in this case will be solved by the true answer to the question "are the debts which are sought to be set off one against the other mutual debts between the same parties and in the same interest?" If it could be correctly stated in the present case that the debt sued for by the liquidating company was a debt incurred and due upon the making of the contract of the 19th of November, before the liquidation, although not payable until after the liquidation, the two sets of debts would have been mutual and in the same interest, and could have been set off one against the other. But in reality no debt was created until the delivery of the goods after the

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commencement of the liquidation, and the only remaining question is whether this delivery having taken place in a certain sense in fulfilment of a contract made before the liquidation gives the debt that character in interest and mutuality that is necessary to make it a subject of set-off against the debt of the company.

In determining this question it is necessary to consider the effect upon the company and its operations of a petition for liquidation followed by a subsequent order to wind-up. In the the first place, the purpose of the winding-up is to make an equable and rateable distribution of all the assets of the company, from the moment of the commencement of the winding-up, that is the presentation of the petition, amongst all the creditors of the company without favour or preference to any one according to the legal rights of the creditors and the company at the moment of the commencement of the winding-up. All the assets of the company are to be got in and collected in the most beneficial way and distributed. In fact, from the moment of the winding-up, the company is stopped as an independent going concern.

Every transaction entered into by the company from that moment is void unless sanctioned by the Court; no contracts can be executed nor can the business of the company be carried on in a single particular except for the purposes of winding-up and for the benefit of the creditors, and, although the company continues in existence and under the same name, and may, if allowed by the Court, continue to carry on its business and enter into or complete transactions, it does so in a new interest and a new capacity, and solely for the purpose of winding-up its affairs in the interest of its creditors and shareholders except in one class of cases which have no application to the present, viz., where transactions bonâ fide executed and carried out between the petition and the winding-up order may in the discretion of the Court be ratified and confirmed. The practical effect of the defendants' contention would be that the company by a transaction which is void, unless sanctioned and ratified by the Court, would be paying one creditor in full out of the assets of the insolvent company in preference to the other creditors; such a result may well make one pause before giving effect to such a contention.

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Having regard to these considerations, it seems to me that the delivery of the iron by the company subsequent to the commencement of the liquidation gave rise to a debt due to them in a new capacity and interest, and that such a debt is not liable to a set-off of a debt incurred by nominally the same company when it was carrying on its business independently and for its own benefit. The judgment will be for the plaintiffs for 216*l.* 18*s.*

Judgment for plaintiffs.

Solicitors for plaintiffs: *Sharpe, Parkers, Pritchard, & Sharpe, for Peace, Ackerley, & Co.*

Solicitors for defendants: *J. J. & C. J. Allen, for J. H. Gregory.*

E. L.

[CROWN CASE RESERVED.]

1881
March 5.

REG. *v.* LOVELL.

Larceny—Money demanded with Menaces.

The prosecutrix gave L., a travelling grinder, six knives to grind for her, the ordinary charge for grinding which would be 1*s.* 3*d.* L. ground the knives, and then demanded with threats 5*s.* 6*d.* as his charge from the prosecutrix. The prosecutrix, being thus frightened, in consequence of her fears paid L. the sum demanded.

The jury found that the money was obtained by menaces, and convicted L. of larceny:—

Held by the Court (Lord Coleridge, C.J., Lindley, Hawkins, Lopes, and Bowen, JJ.), that the conviction was right.

Reg. v. *M'Grath* (L. R. 1 C. C. R. 205), followed.

THE following case was stated for the opinion of this Court by the chairman of the Worcestershire Quarter Sessions:

"The prisoner was tried before me at the last Worcestershire Quarter Sessions, on an indictment which charged him in the first count with stealing the sum of 5*s.* 6*d.*, the property of Eliza Grigg, and in the second count, with demanding with menaces from the said Eliza Grigg, the sum of 5*s.* 6*d.*, with intent to steal the same. The facts were these:—The prisoner was a travelling grinder. He

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ground two pairs of scissors for the prosecutrix, for which he charged her fourpence. She then handed him six knives to grind. He ground them and demanded 5*s.* 6*d.* for the work. She refused to pay the amount, on the ground that the charge was excessive. The prisoner then assumed a menacing attitude, kneeling on one knee, and threatened prosecutrix, saying, 'you had better pay me, or it will be worse for you;' and 'I will make you pay.' The prosecutrix was frightened, and in consequence of her fears gave the prisoner the sum demanded. Evidence was given that the trade charge for grinding the six knives would be 1*s.* 3*d.*

"It was contended for the prisoner, that, as some money was due, the question rested simply on a quantum meruit, and that there was no larceny or menacing demand with intent to steal.

"I overruled the objection, and directed the jury on the authority of *Reg.* v. *M'Grath* (1) that if the money was obtained by frightening the owner, the prisoner was guilty of larceny.

"The jury found that the money was obtained from the prosecutrix by menaces, and that the prisoner was guilty.

"I reserved for the consideration of this Court the question whether upon the facts stated he was properly convicted."

No counsel appeared.

PER CURIAM. (2) The conviction in this case was right. *Reg.* v. *M'Grath* (1) is conclusive of the matter.

(1) Law Rep. 1 C. C. R. 205.

(2) Lord Coleridge, C.J., Lindley, Hawkins, Lopes, and Bowen, JJ.

C. D.

ABERCROMBIE *v.* JORDAN.

IN RE HUNT.

1881
July 4, 20.

Solicitor—Attachment against unqualified Person for acting as a Solicitor in the Name of a qualified Solicitor—6 & 7 *Vict.* c. 73, *s.* 2; 23 & 24 *Vict.* c. 127, *s.* 26.

An unqualified person who acts as a solicitor commits an offence against 6 & 7 Vict. c. 73, s. 2, though he acts in the name and with the consent of a duly qualified solicitor.

H., who had carried on the business of an accountant, arranged with C., who had been admitted as a solicitor, that he should use H.'s offices, and any business H. had he was to allow C. to attend to, H. to share in the profits, but in what proportion was not settled,—or, according to H.'s version of the arrangement, H. was to be paid, as a commission, one half share of profits after deducting all expenses, including rent of offices, and was to find money and clerk to carry on the business. Pursuant to this arrangement, H., sometimes with C. and sometimes alone, transacted various matters which it was alone competent to a solicitor to transact, generally using the name of C. & Co., but sometimes not, and not always with the knowledge or express sanction of C.:—

Held, by the Court of Appeal, affirming the Queen's Bench Division, that H. had been guilty of a contempt of Court, and that an attachment must issue against him.

THIS was an application at the instance of the Incorporated Law Society for an attachment under 23 & 24 Vict. c. 127, s. 26 (1), against an unqualified person named Edwin A. Hunt for a contempt of Court in acting as a solicitor in contentious business in the name of a qualified person; contrary to the 6 & 7 Vict. c. 73, s. 2. (2)

By an order of the Court dated the 5th of April, 1881, the matter was referred to one of the masters to inquire into the same

(1) Which enacts that "every person who acts as an attorney or solicitor contrary to the enactment in s. 2 of 6 & 7 Vict. c. 73," or who does certain other things, "without being duly qualified so to act, shall be deemed guilty of a contempt of the Court in which the action, &c., shall be brought, and may be punished accordingly."

(2) Which enacts that "no person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding in the name of any other person, or in his own name, in any Court, &c., unless admitted and inrolled and otherwise qualified to act as an attorney or solicitor," &c. And see s. 32.

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and report thereon to the Court. The master, on the 11th of June, 1881, made a report, of which the following is an abstract:

On the 5th of September, 1879, Hunt, who had been an accountant about five years, and was at that time carrying on business as an accountant at No. 23, Charlotte Street, inserted the following advertisement in *The Times* newspaper: "To Solicitors. A gentleman just admitted, without practice, can be offered business (or a position) at a good remuneration. Lex, F. 563 Address and Enquiry Office, *The Times* Office, E.C."

E. B. Cotton, who had been admitted in 1866, but had only taken out his certificate for the last seven years, on the following day answered the advertisement, and ultimately an arrangement (not in writing) was made between him and Hunt. According to Cotton's account the arrangement was that he should use Hunt's offices, and any business Hunt had he was to allow Cotton to attend to. That Hunt was to share in the profits; but that no proportion of profits was named; that there was no agreement for Cotton to pay rent, and that he never paid any; that nothing was said about Hunt's services, he was to get the business, and do nothing else. Hunt's account of the arrangement was that he was to be paid as a commission one half share of profits after deducting all expenses, including rent of offices, and was to find money and clerk to carry on the business.

Some time previously to September, 1879, Hunt, by the name of E. A. Hunt & Co., had been in correspondence, on behalf of Mr. Abercrombie, with a Mr. Picard, on behalf of Mrs. Jordan, who owed Abercrombie a debt of 34*l.* 18*s.* 10*d.* On the 5th of December, 1879, the writ in *Abercrombie* v. *Jordan*, was filled up and issued by Hunt, indorsed "this writ was issued by Messrs. E. B. Cotton & Co., of 23 Charlotte Street, Bedford Square, solicitors for the plaintiff," for the recovery of this debt of 34*l.* 18*s.* 10*d.*; and on the 15th of December, 1879, an order for substituted service was obtained upon an affidavit made by one P. Davies, who had for some time previous to the arrangement with Cotton been Hunt's clerk. In his affidavit Davies described himself as "clerk to Messrs. E. B. K. Cotton & Co., of 23, Charlotte Street, Bedford Square, solicitors for the above-named plaintiff."

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On the 20th of December, 1879, Mr. Picard, on behalf of Mrs. Jordan, sent by post to Messrs. E. B. Cotton & Co. his cheque payable to Messrs. E. B. Cotton & Co., or order, for 22*l.* 2*s.* 10*d.*, being 17*l.* 18*s.* 10*d.* on account of debt, and 4*l.* 4*s.* agreed costs, "conditionally on your waiting until the 2nd of February next for payment of the balance of debt, 17*l.*" The letter containing this cheque for 22*l.* 2*s.* 10*d.* was opened and answered by Hunt (who used to open and answer letters addressed to Messrs. Cotton & Co.); but the receipt of the cheque was not communicated to Cotton. Hunt, however, indorsed the cheque "E. B. Cotton & Co.," and, having also written his own name E. A. Hunt beneath that, obtained cash for the cheque through a friend's banker.

At the beginning of February, 1880, Hunt again applied in the name of E. B. Cotton & Co. to Picard for the balance (17*l.*) due from Mrs. Jordan; and obtained a cheque on the 17th of February for the 17*l.*, payable to "Messrs. E. B. Cotton & Co., or order." This cheque Hunt also indorsed "E. B. Cotton & Co.," with "Edwin A. Hunt" underneath, and obtained cash for it through the same friend's banker, as before.

Cotton was not informed of the receipt of either of these two sums, no part of either of them was ever paid to Abercrombie, who, after some correspondence with Hunt in Hunt's own name, and not in that of Cotton & Co., in which he Hunt promised a settlement, which was never carried out, placed the matter in the hands of Mr. Wilkins, another solicitor. That gentleman, on the 5th of April, 1880, issued a writ against Hunt for the 34*l.* 18*s.* 10*d.*, to which Hunt, without any communication with Cotton, entered an appearance in the name of Messrs. Cotton & Co. On the 20th of April, Wilkins obtained judgment under Order XIV.

In his affidavit, in answer to the summons under Order XIV, Hunt described himself as "solicitor's clerk."

After the arrangement made in September, 1879, between Cotton and Hunt, Cotton used to call at 23, Charlotte Street, two or three times a week; and soon afterwards several legal matters, both in the supreme Court and in the metropolitan county courts, were carried on by Cotton, with the assistance of Hunt and Davies, in the name of E. B. Cotton & Co. On the 9th of

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December, 1879 (a few days after the writ in *Abercrombie* v. *Jordan*, was issued), Cotton called and examined Davies as a witness to prove service of a judgment summons, and Davies when examined called himself a clerk in the employ of the plaintiff's solicitors, 23, Charlotte Street. The master found therefore that the writ in *Abercrombie* v. *Jordan*, was issued by Cotton's implied if not with his express authority, although perhaps without his actual knowledge.

The master concluded by expressing his opinion that Hunt could not be said to have been guilty of a contempt of Court within the meaning of the statute under which the order was made, as he seemed to have acted in *Abercrombie* v. *Jordan*, the matter referred to in the order, with the implied if not the express authority of Cotton.

T. T. Fillan, on behalf of Hunt.

Wills, Q.C., and *Murray*, were heard on the part of the Incorporated Law Society.

F. Turner, appeared for Cotton, but the Court refused to hear him on the ground that Cotton was not a party to the order.

GROVE, J. I think the order for an attachment of Mr. Hunt should be made absolute. The substance of the case is, that, so far from being, as he describes himself in one proceeding, the clerk of Cotton & Co., he really so to speak employs the solicitor. In his advertisement, which is addressed "to solicitors," he says,—"A gentleman just admitted, without practice, can be offered business (or a position) at a good remuneration." That is an offer, not to serve but to employ a qualified practitioner. Mr. Cotton, who had been admitted a solicitor, answers the advertisement, and an arrangement is made between him and Hunt for carrying on the business of a solicitor (upon terms which do not seem to have been very clearly defined) under the name of Cotton & Co. at premises which have been for some considerable time occupied by Hunt as an accountant. Hunt conducts the business, and there is no doubt to some extent at least with the connivance of Cotton. Some matters Hunt conducts without

using Cotton's name, though in some instances he uses the name of Cotton & Co. He attends summonses at chambers, and does other things himself apparently without Cotton's direct authority. In one case he issues a writ, indorsing it, "This writ was issued by E. B. Cotton & Co., of 23, Charlotte Street, Bedford Square, solicitors for the plaintiff;" and, on the 20th of December, 1879, he receives from the defendant's solicitor a cheque for 22*l.* 2*s.* 10*d.* in satisfaction of the costs and a portion of the debt, and on the 7th of February, 1880, another cheque for 17*l.*, the balance of the debt. These two cheques were made payable to Messrs. E. B. Cotton & Co., or order. The letters inclosing these cheques were addressed to Messrs. Cotton & Co., and were opened by Hunt, who indorsed the cheques "E. B. Cotton & Co.," with his own name underneath: and he obtained and kept the proceeds. This, as Cotton avers, was done without his authority or knowledge. It is true that in the first instance some sort of implied authority was given by Cotton to Hunt. By entering into the arrangement he confessedly did enter into he must be assumed to have lent his name and sanction to what Hunt did, though perhaps not to the extent of allowing himself to be treated as a partner with him. The case seems to me to fall exactly within the prohibition of the statute,—"No person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding in the name of any other person or in his own name, &c., unless admitted and inrolled and otherwise duly qualified to act as an attorney or solicitor:" 6 & 7 Vict. c. 73, s. 2. And any person so acting is by 23 & 24 Vict. c. 127, s. 26, made punishable as for a contempt of Court. We have spoken to the master, and he is inclined to agree with us. What led him to think it doubtful whether Hunt had brought himself within the penalty of the statute was that in the first instance he seems to have had an implied authority from Cotton to act for him. But, looking at all the facts of the case, it appears to me to go far beyond any supposed implied authority from Cotton. The inference I draw from the facts stated in the master's report is, that Hunt was substantially the acting man,—acting not only in Cotton's name, but in his own name also. I think there is abundant evidence that he

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was acting as a solicitor without having been admitted or duly qualified. The order must be made absolute.

DENMAN, J. I am of the same opinion. The master's report discloses very clear evidence indeed of Hunt's having acted as a solicitor in the name of Cotton & Co. in a matter in which he himself was the defendant; and this without a shadow of pretence that he had Cotton's implied authority for so doing. I presume from the conclusion of his report that the master thought the inquiry was limited to the proceedings in the case of *Abercrombie* v. *Jordan*, and accordingly he confined his attention to that case. I may, however, observe that the master was not bound to state his own opinion at all: he was required by the order to report the facts, so that the Court might form its own judgment as to how far the party charged had infringed the statute. The course pursued has somewhat hampered us; because, where a matter is referred to a master for investigation, and he has had an opportunity of seeing the parties face to face, we would not willingly take a different view upon a question of fact from that taken by him. But, in my judgment, this case may be dealt with without substantially differing from the conclusion the master has arrived at. He has evidently taken this view, that, because as to a great part of the transactions it would not be right to say that Hunt had been acting altogether without Cotton's authority, therefore he has not brought himself distinctly within the penalty of the statute. But it is clear that he has in some respects, especially with regard to the receipt of the two sums of 22*l.* 2*s.* 10*d.* and 17*l.*, and in some other transactions disclosed in the report, assumed to act entirely without Cotton's authority. He was practically the only person who acted as solicitor in *Abercrombie* v. *Jordan*. Starting with the advertisement of the 5th of September, 1879, and going through the several matters reported, Hunt seems throughout to have acted as a solicitor under colour of Cotton's name. The substance of Cotton's affidavit, as set out in the master's report, is, that Hunt appeared to be the solicitor and did the work as a solicitor, merely using Cotton's name, at his (Hunt's) own office. Hunt's account is somewhat different. But I think it would be too much to allow such a juggle to prevail. The whole

of the facts seem to me to point irresistibly to one conclusion, viz. that Hunt was carrying on the business of a solicitor in Cotton's name for the joint profit of both. I therefore agree that the attachment ought to issue.

Order absolute.

J. S.

Hunt appealed.

July 20. *T. T. Fillan*, for the appellant. Hunt merely acted as a managing clerk, for he had Cotton's authority. The case, therefore is not within 6 & 7 Vict. c. 73, s. 2, for he has not acted as a solicitor, but comes within s. 32. Under that section the solicitor must first be proceeded against: *Re Hodgson* (1); and no steps here have been taken against him. Sect. 2 can only apply where the unqualified person represents himself to be a solicitor.

Wills, Q.C., and *Murray*, contrà, were not called upon.

JESSEL, M.R. The argument of the appellant is that s. 2 of the Act 6 & 7 Vict. c. 73, does not apply to the case. That section provides, in very general terms, that no person shall act as an attorney or solicitor, unless he is duly qualified as therein mentioned. Sect. 32 has a different object; it imposes a penalty on a solicitor who helps an unqualified person to act as a solicitor. Sect. 2 is directed against the unqualified person. Sect. 32 is primarily directed against the solicitor, but adds a summary remedy against the unqualified person. Under s. 2 the only remedy against the unqualified person would be by indictment. Sect. 32 gives a summary remedy against him. The Act 23 & 24 Vict. c. 127, s. 26 extended the summary remedy, and made the offending party liable to be attached for contempt of Court. Here Hunt has been attached for acting as a solicitor. It is argued that because he had the consent of Cotton he does not come within s. 2, for that he must be considered to have acted at Cotton's managing clerk, and that therefore the case is only within s. 32 of the earlier Act, but, in my opinion, the evidence

(1) 3 Dowl. 330.

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entirely negatives the notion that he acted as managing clerk to anybody. The appeal must be dismissed.

BRETT, L.J. I am of the same opinion. The case is too plain for argument. An accountant wishes to practise as a solicitor, and tries to cover what he knows to be illegal by an arrangement with Cotton that he shall act under the name of Cotton & Co.

COTTON, L.J. I am of the same opinion. The appellant contends that the case does not come within s. 2 but only under s. 32, and that under the latter section no proceeding can be taken against him unless there is an application to strike off the Rolls the solicitor who allowed the use of his name. That section applies only where a solicitor enables the unqualified person to act. But it appears to me that s. 2 applies not only to the case where an unqualified person acts without the consent of a qualified solicitor, but where he acts with such consent, and that a case is not taken out of s. 2 by the fact that it falls within s. 32. The appellant did not pretend to act as managing clerk; he was acting on his own behalf, though he had made an arrangement that he should be at liberty to use the name of a duly qualified person.

Order affirmed.

Solicitor for Incorporated Law Society: *E. W. Williamson.*

H. C. J.

Applied. HELMAN *v.* HORSHAM AND WORTHING ASS. COM. [1948] 2 All E.R. 588.

Referred to. HELMAN'S CASE. [1949] 1 K. B. 62

[IN THE COURT OF APPEAL.]

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Nov. 23;
Dec. 15, 16, 21.

BRADLEY, APPELLANT; BAYLIS, RESPONDENT.
MORFEE, APPELLANT; NOVIS, RESPONDENT.
KIRBY, APPELLANT; BIFFEN, RESPONDENT.

Parliament—Borough Franchise—Dwelling-house—Part of a House—Occupation as Lodger—Rating—30 & 31 *Vict. c.* 102, *s.* 61—41 & 42 *Vict. c.* 26, *s.* 5.

Although by the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 5, the term "dwelling-house" in the Representation of the People Act, 1867 (30 & 31 Vict. c. 102) is to mean part of a house separately occupied, yet in order to be entitled to the borough franchise as the occupier of a dwelling house, the person must have an occupation in respect of which he can be rated to the relief of the poor, and therefore he is not entitled to such dwelling-house franchise by reason of the occupation of part of a house if he occupies such part as a lodger.

The tenant of two rooms which he took unfurnished at a weekly rent, had the exclusive use of such rooms, and a key of the outer door of the house. His landlord had also a key of the outer door, and resided in all the rest of the house, but supplied no attendance or service to such tenant:—

Held, that such tenant occupied the rooms as a lodger, and consequently that in respect of such occupation he could not acquire the dwelling-house franchise under the Representation of the People Act, 1867.

The tenant of two rooms which he took unfurnished at a weekly rent, had in common with the other tenants of the house, which was wholly let out on similar tenancies, the use of the passages, staircase, street door, and usual conveniences of the house. The landlord and not the tenant was rated, and the landlord did all repairs inside and out, but he did not reside in the house, nor did he, save as aforesaid, retain the control and dominion over the house, or render any services to any of the tenants:—

Held, that such tenant did not occupy the rooms as a lodger, but as an occupying tenant under the Representation of the People Act, 1867, and that he could therefore acquire the dwelling-house franchise in respect of such occupation.

BRADLEY *v.* BAYLIS.

APPEAL from the revising barrister for the borough of Chelsea. The case stated as follows:—

The appellant claimed to be inserted as an inhabitant householder in the occupiers' list for the parish of Hammersmith. He had occupied as his residence for upwards of twelve calendar months previously to the 15th of July, 1881, one unfurnished room in a dwelling-house at a weekly rent of 3*s.* 6*d.*, the clear

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yearly value of which room, if let unfurnished, was under 10*l*. The room was rented by him from the tenant of the entire house, who held of the owner of the house at a yearly rent.

The house comprised more rooms than that occupied by the appellant.

Subject to the occupation by the appellant and to the appellant's right of access to and from the outer door, the renter of the entire house, who throughout the qualifying year of occupation of the room of the appellant resided on the premises, "exercised from the 15th of July, 1880, to the 15th of July, 1881, a general control over the whole house" (1), but rendered no service either by himself or by any servant to the appellant.

Subject to the question whether the room so occupied by the appellant was or was not a dwelling-house for the purposes of the Representation of the People Act, 1867, he was in all respects qualified to be inserted in the occupiers' list for the borough of Chelsea for the year 1881.

It was contended on behalf of the appellant that under such state of facts he was the separate occupier of a room or rooms constituting for the purposes of the Representation of the People Act, 1867, by virtue of s. 5 of the Parliamentary and Municipal Registration Act, 1878 (2), a dwelling-house, as tenant, and as such entitled to be on the list of occupiers. On this point of law the revising barrister decided against him; the claim being disallowed on the ground that as the renter of the entire house resided in the

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(1) It was admitted on the argument that no facts in support of this statement could be stated beyond what were to be gathered from the cases themselves.

(2) Sect. 5 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), enacts that "in and for the purposes of the Representation "of the People" Act, 1867, the term dwelling-house shall include any part of a house where that part is separately "occupied" as a dwelling, and the term lodgings shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house. For the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part. The interpretation contained in this section of "dwelling house" shall be in substitution for the interpretation thereof contained in s. 61 of the Representation of the People Act, 1867, but not so as to affect any of the other provisions of the said Act relating to rating.

house and exercised a general control over the same, although without rendering any service to the claimant, during the period of his qualification, the occupation of the claimant was that of a lodger, and not that of an inhabitant occupier as tenant of a dwelling-house.

Forty-six other persons claimed under similar circumstances to be inserted as inhabitant occupiers in the list of occupiers for various parishes within the borough. The revising barrister disallowed the whole of the claims, and ordered the appeals to be consolidated.

If the Court was of opinion that the revising barrister was wrong, the lists of persons claiming otherwise than as lodgers were to be amended, by inserting the names and qualifications of the appellant and the other claimants; otherwise the claims were to be deemed to have failed.

Nov. 23. *Bompas, Q.C.* (*J. F. Torr* with him), for the appellant. The revising barrister was wrong. It is admitted by the respondent that the appellant furnished the room and resided there, and that by the right of access to the outer door it is meant that the appellant had a key thereof. The sole question for decision is whether the room occupied by the appellant was a dwelling-house for the purposes of the Representation of the People Act, 1867, as amended by the Parliamentary and Municipal Registration Act of 1878. By the 27th section of the Reform Act of 1832 (2 & 3 Wm. 4, c. 45) the borough franchise was granted to all occupiers of houses of the annual value of 10*l.* who were rated to the poor rate, subject to certain provisions as to the payment of rates and as to residence. By the 3rd section of the Act of 1867 (30 & 31 Vict. c. 102) the borough franchise was extended to every inhabitant occupier for twelve months as owner or tenant of any dwelling-house, who had been rated to the poor-rate during the time of his occupation; and the 61st section of that Act says that a dwelling-house shall include "any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." This definition has been altered by the 5th section of the Act of 1878 (41 & 42 Vict. c. 26), by which it is enacted that "the term dwelling-house shall include any part of a house where that part

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is separately occupied as a dwelling." In *Cook* v. *Humber* (1) the Court decided that the franchise was not conferred by the occupation of a part of a house which was not structurally severed from the rest; but they distinctly held that, as far as the nature of the occupation went, such an occupation as the present was sufficient, it being in that case the subject of occupation which was held to be insufficient. To meet this decision the 61st section of the Act of 1867 was passed, subsequent to which the cases of *Thompson* v. *Ward* (2) and *Ellis* v. *Burch* (2) were decided. In each of these cases, the circumstances being almost identical with those of the present case, Bovill, C.J., and Keating, J., held that such an occupation constituted the occupation of a dwelling-house within ss. 3 and 61 of the Act of 1867, while Willes and Brett, JJ., were of a contrary opinion. Subsequently, the case of *Boon* v. *Howard* (3) was decided on very similar facts with a like difference of opinion, Keating and Denman, JJ., holding that the franchise was conferred, Brett and Honeyman, JJ., that it was not.

[DENMAN, J. In that case the landlord did not live on the premises.]

It is a mere accident that the landlord lives in the house, and does not affect the case. The 5th section of the late Act distinctly says what is to be the nature of the tenement, "a part of a house separately occupied as a dwelling-house," and it was passed in order to put an end to the conflict of judicial opinion.

G. M. Freeman, for the respondent. The only question is, the meaning of the defining clause in the new statute. That clause omits all reference to rating, and makes a verbal alteration as to separate occupation. That alteration is in reality a change from the description of the place to the description of the manner of occupation, and the intention of the legislature was to do away with the doubts as to the necessity of structural severance; but it does not confer the franchise upon a person who, as in the present case, is a mere lodger. In *Toms* v. *Luckett* (4) Maule, J., says: "Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and

(1) 11 C. B. (N.S.) 33.
(2) Law Rep. 6 C. P. 327.
(3) Law Rep. 9 C. P. 277.
(4) 5 C. B. 23.

egress, yet, if the owner retains his character of master of the house, the individual so occupying a part of the house occupies it as a lodger only, and not as a tenant. . . . The question depends upon whether or not the owner of the house resides upon the premises, retaining his quality of master, and reserving to himself the general control and dominion over the whole."

[DENMAN, J. What is the meaning of general control?]

A right to go into the rooms in the house to see if they are used in a proper manner. Here the landlord not only has a general control, but lives in the house. In *Thompson* v. *Ward* (1) Bovill, C.J., says: "Where a landlord resides in part of a house, and there is an outer door from the street, and he by himself or his servants has the control of this outer door, and undertakes the care or control of rooms let to other persons and the access to them, and those rooms themselves have not anything in the nature of an outer door, and are not structurally severed from the rest of the house, there could be little hesitation in saying that an occupier of those rooms, being part of the house, is only a lodger. . . . It is always important, in determining whether a man is a lodger, to see whether the owner of the house retains his character of master of the house, and whether he occupies a part of it by himself or his servants, and at the same time retains the general control and dominion over the whole house; and this he may do, though he do not personally reside on the premises." The 5th clause of the Act of 1878 expressly says that "lodgings" may, for the purposes of the Act of 1867, be either furnished or unfurnished; the appellant's room was therefore a lodging within the meaning of that section, and the appellant himself was a lodger as defined in the judgments referred to. [He also referred to *Phillips* v. *Henson*. (2)]

Bompas, Q.C., in reply. In *Phillips* v. *Henson* (2) Grove, J., says that a man may be both tenant and lodger. In this case it is quite possible that the two franchises may overlap; but it is unnecessary to decide whether the appellant is a lodger; all that is necessary in order to gain the occupation franchise is that the claimant should separately occupy a part of a house as a dwelling. In *Thompson* v. *Ward* (1) Bovill, C.J., to a great extent based his

(1) Law Rep. 6 C. P. 327. (2) 3 C. P. D. 26.

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definition of a lodger on the assumption that the landlord had the control of the outer door and general control over all the rooms in the house; but here the appellant had a key of the outer door as well as his landlord. The case of *Toms* v. *Luckett* (1) was considered in *Cook* v. *Humber* (2), in which case it was decided that the occupation was sufficient, but that there was no structural severance, upon which point the decision turned; the question of structural severance cannot arise now.

MORFEE *v.* NOVIS.

APPEAL from the revising barrister for the borough of Hastings. George Morfee claimed to have his name inserted in the list of voters in respect of the occupation of a dwelling-house. He was the occupier of two rooms on the first floor of the house in respect of which he claimed, using one as a bedroom and the other as a sitting-room, and in the latter he and his wife took their meals, the wife doing the cooking in the room. He took the rooms unfurnished at the weekly rent of 3*s.*, and his landlord Darius Cousin, who was the tenant of the whole house, which consisted of six rooms, resided in all the rest of the house. Morfee and Cousin each had a key of the outer door, and there was a wash-house attached to the house which they used in common. No attendance was supplied or service rendered by Cousin to the claimant, the wife of the latter doing the cleaning and all that was required for the occupation of the rooms.

Cousin was alone rated to the poor-rate, and he was rated in respect of the occupation of the entire house; he duly paid the rates. Morfee had the exclusive use of the rooms rented by him; he had resided sufficiently long, and all other requisites to entitle him to be registered were proved, provided that he were an occupier of a dwelling-house within the meaning of the statutes.

The revising barrister was of opinion that although Morfee had the exclusive use of the two rooms, yet Cousin retained to himself such an occupation of the entire house as would constitute him, and not Morfee, the proper person to bring trespass for a trespass

(1) 5 C. B. 23. (2) 11 C. B. (N.S.) 33.

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committed in any part of the house, including the rooms occupied by Morfee; that Cousin was the proper person to be rated as the occupier of the house, and that therefore Morfee was not the occupier of a dwelling-house within the meaning of the statutes, but that he occupied the said rooms as a lodger only. He therefore disallowed the claim, and also the claims of thirty-three other persons who claimed under similar circumstances. All the cases were consolidated

Biron (*Gill* with him), for the appellant. The revising barrister has found that the appellant has the "exclusive use" of these rooms; he therefore comes within the 5th section of the Act of 1878.

[BOWEN, J. Exclusive use does not necessarily imply exclusive occupation; a lodger may have the exclusive use of his rooms.]

The facts of the present case shew that the appellant was not merely a lodger, but an occupier.

Hollings (*H. C. Richards* with him), for the respondent. This case differs from the last in that the appellant had the additional accommodation of the use of the wash-house in common with his landlord; he therefore merely had a joint, and not the exclusive, occupation of the qualifying tenement. It differs also from all the reported cases, because in those the landlord lived elsewhere than on the premises. In *Allan* v. *Overseers of Liverpool* (1), which was a rating case, Blackburn, J., says, "The occupier must be the exclusive occupier, a person who, if there was a trespass committed on the premises, would be the person to bring an action of trespass for it."

[He also cited *Thompson* v. *Ward* (2), *Stamper* v. *Overseers of Sunderland* (3), and *Boon* v. *Howard*. (4)

KIRBY *v.* BIFFEN.

APPEAL from the revising barrister for Westminster.

The name of George Biffen appeared in the list of claimants as

(1) Law Rep. 9 Q. B. 180.
(2) Law Rep. 6 C. P. 327.
(3) Law Rep. 3 C. P. 388.
(4) Law Rep. 9 C. P. 277.

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claiming otherwise than as a lodger to have his name inserted in the list of voters, the nature of his qualification being described as "dwelling-house." He had occupied for the qualifying year as tenant, at a weekly rent of 7*s.*, two rooms on the first floor, which were neither structurally severed from the rest of the house nor separately rated, nor was the name of the claimant entered in the occupier column of the rate-book. The landlord was rated in respect of the whole house, and had paid all the rates. The furniture in the two rooms was the claimant's own. The house, which contained eight rooms, was wholly let out on similar tenancies, the landlord doing all repairs inside and out. The tenants had the common use of the passages, staircase, street-door, and usual conveniences of the house. The landlord did not reside in the house, nor, save as aforesaid, did he by himself or his servants retain the control and dominion over the house, or any part of it, or render any services to any of the tenants. He simply received his rents from them. The claimant was objected to as not being an occupier, the grounds of objection being,—

1. That by the words of its title the Act of 1878 did not contemplate an extension of the franchise:

2. That at the time of the passing of the Act of 1867 local Acts were in force in the city of Westminster for rating owners instead of occupiers, and that therefore according to the case of *Stamper* v. *Overseers of Sunderland* (1) the claimant was entitled as a lodger only:

3. That the Act of 1878 makes provision both for lodgers and occupiers, and makes several further elaborate provisions for the former:

4. That the example of a lodger claim in the schedule to the Act of 1878, Form H 2 (which is made part of the Act), is that of a lodger claimant whose landlord does not reside in the same house as the claimant:

5. That the part of a dwelling-house occupied by a claimant must, to confer the dwelling-house franchise, be a rateable hereditament, and not merely a part of a rateable hereditament.

The revising barrister thought that the claim was good, but took evidence, notwithstanding objection on the part of the

(1) Law Rep. 3 C. P. 388.

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objector, to enable the claimant to establish a claim to the lodger franchise in case he was not entitled to the dwelling-house franchise; from which evidence he found that he would have been entitled as a lodger if he had made a proper lodger claim. The objector objected on the ground that, if the revising barrister decided that the claimant had proved a qualification as an occupier, he was precluded by the 12th and 13th sub-sections of the 28th section of the Act of 1878 from hearing evidence to constitute a qualification of any other nature or description, and from inserting the name in the lodger list. The objections were overruled.

The claims of 196 other persons to the dwelling-house franchise depended on a similar state of facts, 186 of whom would have been entitled to the lodger franchise, had they made claims as lodgers, while the other ten would not have been so qualified.

The revising barrister decided that the whole of the claimants had made out their claims to be placed on the household list, and he placed them on that list; and that, if they were not qualified as occupiers, the names of the appellant and 186 other claimants ought to be transferred to the lodger list. If the Court was of opinion that the revising barrister was wrong, the whole of the names were to be struck out of the household list and the names of the appellant and 186 others were to be transferred to the lodger list, if the Court should be of opinion that it had power to order such transfer.

Charles, Q.C. (*Kingsford* with him), for the appellant. The first question is, were these claimants householders? The Act of 1878 was not an Act to amend the laws of representation, like the Acts of 1832 and 1867; it was passed, as is shewn by its title, in order to deal with the question of registration, and the legislature cannot have intended in an Act dealing with registration to effect such an extraordinary alteration in the franchise as will be the case if these claimants are entitled to be placed in the occupiers' list. In the 5th section of the Act of 1878 the previous provision as to separate rating disappears, and there is an alteration in the position of the word "separately;" it deals also with both furnished and unfurnished lodgings. In numerous other clauses

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elaborate provisions are made with respect to the lodger franchise, but, if the revising barrister in this case is right, that franchise will practically disappear, as persons will be entitled to the occupation franchise who are unable to qualify as lodgers by reason of their rooms not being of the necessary yearly value of 10*l.* The 4th section of the Act of 1867, which creates the lodger franchise, enacts that a man shall be entitled to be registered as a voter who, "as a lodger, has occupied in the same borough separately and as sole tenant for the twelve months preceding the last day of July in any year the same lodgings, such lodgings being part of one and the same dwelling-house, and of a clear yearly value, if let unfurnished, of ten pounds or upwards;" this Act, therefore, clearly contemplates the separate occupation of unfurnished rooms as giving the lodger franchise. Again, the 8th section of the Act of 1878, says that the schedule thereto is to be construed as though it were enacted in the body of the Act, and in Form H. 2 in the schedule, which gives the form of a lodger claim, the address of the claimant appears as "Brick Street," while that of the landlord is "High Street;" the legislature, therefore, clearly contemplated that in such a case as the present, where the landlord lives off the premises, the claimant might be looked upon as a lodger. In *Stamper* v. *Overseers of Sunderland* (1), which raised the question of the meaning of the exception in the 7th section of the Act of 1867, Montague Smith, J., in his judgment, points out the distinction intended to be drawn by that Act between the occupier of mere rooms and apartments in an ordinary house, and the occupier of small tenements such as chambers in the Temple; and he goes on to shew the anomaly that would exist in the franchise if a lodger, strictly so called, were not entitled to the franchise unless his rooms if let unfurnished were of the value of 10*l.* a year, whilst a man might occupy a room, however small its value, in a house wholly let out in separate apartments, and yet be entitled to the occupation franchise. The 5th section of the Act of 1878 does not enlarge the definition in the 61st section of the Act of 1867 with respect to a dwelling-house, except so far as regards the disappearance of the necessity for separate rating.

(1) Law Rep. 3 C. P. 388.

In the Irish case of *Lang* v. *Edwards* (1) it was held that a shop and parlour separately occupied, but not structurally severed from the rest of the house, were lodgings.

[BOWEN, J. Are you not driven to rely on the old doctrine of structural severance?]

No: structural severance is a test of separate occupation; but the reasoning of Brett, J., in *Thompson* v. *Ward* (2), which is based not on structural severance but on exclusive occupation, is applicable as well now as prior to the passing of the Act of 1878.

Secondly, the barrister was wrong in transferring 186 of these claims to the lodger list under the powers given by the 12th sub-section of s. 28 of the Act of 1878. (3) Under this section the only power given is that of transferring the name where the occupation qualification is *not* made out; while here the revising barrister decided that the occupation was sufficient to give that qualification.

R. S. Wright, for the respondent. The alteration made by the 5th section of the Act of 1878 is directed to the very point in question, for it makes separate occupation sufficient. It is very probable that the occupation and lodger franchises do overlap to a certain extent; but there are many cases to which only the lodger franchise is applicable, e.g., joint occupancy, which would not confer the occupation franchise.

As to the second point; the sole object of the enactment is that the name should not appear in two lists, and in this case the revising barrister has merely provisionally put the names in the lodger list; he has in fact made a duplicate or provisional

(1) 3 Ir. Rep. (C.L.) 155; Rogers on Elections, 13th ed. p. 58.

(2) Law Rep. 6 C. P. 327.

(3) 41 & 42 Vict. c. 26, s. 28, subs. 12, enacts that "Where the matter stated in a list or claim, or proved to the revising barrister in relation to any alleged right to be on any list, is in the judgment of the revising barrister insufficient in law to constitute a qualification of the nature or description stated or claimed, but sufficient in law to constitute a qualification of some other nature or description, the revising barrister, if the name is entered in a list for which such true qualification in law is appropriate, shall correct such entry by inserting such qualification accordingly, and in any other case shall insert the name with such qualification in the appropriate list, and shall expunge it from the other list, if any, in which it is entered."

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judgment. The 67th section of 6 & 7 Vict. c. 18, specifies how the register is to be altered.

Charles, Q.C., in reply. As to the last point it is clear from sub-s. 13 (1) of s. 28 of the Act of 1878 that the revising barrister is the proper officer to decide this matter. In *Jones* v. *Marshall* (2) the revising barrister held the notice of objection bad; he then went into the validity of the votes objected to, and struck them all off, subject to the opinion of the Court as to the validity of the notice of objection. The objector appealed; but it was held that the appeal could not be heard, as the parties had been struck off, Willes, J., saying, "There is no section of the Act that speaks of a provisional striking off. That must be done finally, subject to the revision of the Court."

DENMAN, J. If we thought that there was a substantial difference between any of these appeals, we should have taken time to consider our judgment; but we think that practically the same point is raised in all of them, and there is no ground for supposing that by sending back the cases for a further and more particular statement of the facts we should be doing anything but putting the parties to an additional expense. The question intended to be raised in all the cases is whether, since the passing of 41 & 42 Vict. c. 26, s. 5, the several persons who are here as claimants are or are not entitled to the franchise as inhabitant householders, they occupying rooms in a house as their residence to the exclusion of other people, subject only to the fact that the landlord has that sort of control which a landlord always has without having a right to interfere with the exclusive possession of the rooms by them.

In *Bradley* v. *Baylis* the claimant occupied as his residence one unfurnished room; there is no real ambiguity in this expression, it being admitted that he put his own furniture in the room

(1) 41 & 42 Vict. c. 26, s. 28, sub-s. 13, enacts that, "Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same."

(2) 1 Hop. & Colt. 738.

and resided there. The room was taken at a weekly rent from the tenant of the entire house. Subject to that occupation by the claimant and his right of access to the front door, the renter, who resided on the premises, exercised a general control over them. Here again there might be an ambiguity, but the meaning of the expression is admitted (1); the renter rendered no service to the claimant, and it must be taken that no servants were supplied by him to Bradley. The expression "general control" of the landlord is consistent with the fact that in all other respects the claimant had all necessary qualifications. Now, what is meant by general control? I take it to mean only that the landlord could go, subject to the rights of the tenant in the separate room, over the whole house; he could mend the staircase, paint the outer door, repair the roof, and do all other like things consistent with the exclusive rights of the claimant. The latter in fact occupied the room to the exclusion of the landlord.

In *Morfee* v. *Novis* the facts are more fully stated. The claimant had two rooms, a sitting-room and bedroom; they were taken unfurnished at a rent of 3*s*. a week; the claimant's wife cooked and did the ordinary household work, and the claimant and his landlord, Cousin, each had a key of the outer door. Cousin alone was rated, but Morfee had the exclusive use of these rooms, and had resided there sufficiently long.

A question might arise whether "exclusive use" was not consistent with non-exclusive occupation; but there are no facts apparent in the case to shew this, and in the absence of such facts we must take it that the case was stated in order to raise a pure question of law. In all other respects the claimant was entitled to be registered. The revising barrister thought that the landlord had such an occupation as entitled him to bring trespass; that is the only ground on which he puts his decision. None of the facts by themselves would be conclusive as to the position of the claimant, but we are to take the whole of them into consideration, and we think that ample facts are stated in the case to enable us to come to a decision.

The case of *Kirby* v. *Biffen* raised the same point and another point of difficulty, but as to the common point the facts are

(1) See note (1) to page 196, ante.

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amply stated. The claimant was the tenant of two rooms, not structurally severed, at the rent of 7*s.* a week; he was not rated; the furniture was his own. The landlord, who resided elsewhere, did all the repairs: but we are of opinion that this fact amounts to little or nothing, and that the case is identical in principle with the other two. From the mere fact that the form H. 2 in the schedule to 41 & 42 Vict. c. 26 contains the name of the landlord as living in a different street to the lodger claimant, we cannot agree with Mr. Charles that that Act clearly contemplated the case of the lodger's landlord residing off the premises; nor can we conclude therefrom that the right to the franchise depends upon the question whether the landlord occupied other rooms in the same house as the claimant. The sole question in this case, subject to the second point raised by Mr. Charles, is whether the claimant comes within the 5th section of 41 & 42 Vict. c. 26. Mr. Charles contended that the title of that Act shewed that it did not deal with the laws of representation, but only with the question of registration. It undoubtedly does apply to the latter question, but not exclusively, as may be gathered from the words "rights of voting" in the title. This is not a case in which there is any alteration in the right of voting; the 5th section is not an enlarging section, but was merely passed for the purpose of putting an end to doubts which existed in the minds of some of the judges as to certain points. The words of the section are "separately occupied as a dwelling," and the only objection that can be urged with any hope of success is that the occupier is entitled to the joint occupation of some other part of the house with the landlord. Indeed, Mr. Charles admits that he cannot make good his contention without a review of the previous decisions as to structural severance and separate occupation. Now, what is the history of previous legislation on this subject? In 30 & 31 Vict. c. 102, s. 61, the definition of a dwelling-house includes "any part occupied as a separate dwelling." These words have received judicial construction in *Thompson* v. *Ward* (1), *Ellis* v. *Burch* (1), and *Boon* v. *Howard*. (2) In the last case Keating, J., delivered a judgment in which I concurred, holding that premises identical with these conferred the franchise as a

(1) Law Rep. 6 C. P. 327. (2) Law Rep. 9 C. P. 277.

separate dwelling. Brett and Honyman, JJ., thought, though not on precisely similar grounds, that the franchise was not conferred; Brett, J., on the ground that the claimant was only a joint occupier of another part of the same house, and Honyman, J., on the ground that he was not separately rated. Looking at the new Act, it is clear that the object of the 5th section is not to confer a new franchise or to enlarge the previous definitions, but to decide and enact for the future that the view of the meaning of the word "dwelling-house" taken by my Brother Keating and myself was that which the legislature intended to adopt, and that the small verbal alteration to which our attention has been called was made in order to preclude the possibility of the old contention being again raised. The intention of the section is to enact that the occupation of a separate dwelling need not be an occupation of every part occupied to the exclusion of every other person; but that the separate occupation of the qualifying part is sufficient, whatever may be the case as to the common use of the staircase, wash-house, &c. But the succeeding words put the matter beyond all doubt. The section goes on to say, "Where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part." I think that these words stop every gap. The old decisions are not germane to the matter, and we are not justified in going back to all the cases decided before the passing of the Act of 1878; on the new enactment I can entertain no doubt whatever. Our judgment in these cases must be in favour of the claimants of the franchise.

In the case of *Kirby* v. *Biffen* it is unnecessary to consider the point as to the substitution of one claim for another. The inclination of my opinion is that, looking at the substance of the case, the Court might overrule the objection; but I give no opinion on the point. It might, however, be better if for the future revising barristers were always to give a decision, instead of leaving it to the Court to say in which list the name should remain.

BOWEN, J. I concur on the question of the occupation franchise.

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As to the second point, whether the revising barrister has rightly raised the question of the lodger franchise, I doubt whether it is right to put in the lodger list names which have not been struck off the list of householders; but I express no opinion.

Leave to appeal was refused, but after consideration a day was fixed for the question of appeal to be again mentioned to the Court; leave to appeal was then asked for in all the cases and was granted.

Bradley v. *Baylis; Morfee* v. *Novis, Appeals allowed with costs.*

Kirby v. *Biffen, Appeal dismissed, with costs.*

J. S.

The cases accordingly came on to be heard before the Court of Appeal.

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Dec. 15. *Sir F. Herschell, S.G.* (*G. M. Freeman* with him) for the respondent. The claimant is only a lodger and not the occupier of a dwelling-house within the meaning of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102). That Act by s. 3 gives the borough franchise to the "inhabitant occupier, as owner or tenant of any dwelling-house within the borough," and s. 61 states that "dwelling-house" shall include "any part of a house occupied as a separate dwelling and separately rated to the relief of the poor." The 4th section gives the lodger franchise to the occupier "as tenant" of lodgings which are "part of one and the same dwelling-house, and of yearly value, unfurnished, of 10*l.*" The legislature intended, therefore, that there should be a difference between these two franchises. After the passing of that Act, the question arose whether, in order that part of a house might be a dwelling-house within the meaning of that Act, it was necessary that such part should be structurally severed from the rest: *Ellis* v. *Burch* (1), *Thompson* v. *Ward* (1), and *Boon* v. *Howard.* (2) In each of these cases the Court was equally

(1) Law Rep. 6 C. P. 327. (2) Law Rep. 9 C. P. 277

divided in opinion, and unable to come to a decision on the point. In none of them, however, did the landlord reside in the house or exercise any control over it. In that state of things the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26) was passed, which, by s. 5, gives a new interpretation of the word "dwelling-house" in substitution of that given by the 61st section of 30 & 31 Vict. c. 102, the effect of which is to get rid of the necessity of a structural severance, but to leave in operation the other provisions of the Act of 1867 relating to rating; and s. 3 subs. 3 of that Act, which requires that the occupier shall be rated in respect of the premises occupied by him, has not been repealed. The result is that the dwelling-house required for the borough franchise, though it may consist of only part of a house not structurally severed from the rest, must be one in respect of which the occupier has been rated or might have been rated during the qualifying year, and the distinction between the household franchise and the lodger franchise is preserved. It is true that by s. 19 of the Poor-rate Assessment Act, 1869 (32 & 33 Vict. c. 41), the overseers are to enter the name of the occupier in the rate book, whether he or the owner is liable for the payment, and when so entered, such occupier is to be deemed duly rated, and it is further provided that any omission by the overseers to enter such name is not to deprive the occupier of any franchise depending upon rating; still the occupier, to be entitled to the household franchise, must fulfil the condition of s. 3 subs. 3 of the Act of 1867, therefore he must be the occupier of a rateable hereditament and be capable of being rated, which a lodger is not: *Allan* v. *Overseers of Liverpool.* (1) As to when a man occupying part of a house is only a lodger, may be collected from what has been expressed by the Court in the following cases: *Pitts* v. *Smedley* (2), *Score* v. *Huggett* (3), *Wansey* v. *Perkins* (4), and *Cook* v. *Humber.* (5) The effect of the decision of the Queen's Bench Division in the present case is to include as householders persons who are only lodgers, and so to destroy

(1) Law Rep. 9 Q. B. 191.

(2) 7 M. & G. 85; 14 L. J. (C.P.) 73.

(3) 7 M. & G. 95; 14 L. J. (C.P.) 74.

(4) 7 M. & G. 151; 14 L. J. (C.P.) 75.

(5) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

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the distinction between the household franchise and lodger franchise.

Bompas, Q.C. (*Torr* with him) for the appellant. The decision of the Divisional Court was right, as the appellant was entitled to the household franchise which he claimed. He had his own key to the outer door, so that the landlord could not prevent his coming in whenever he pleased, and he had the exclusive use of and control over his room. The landlord, though stated in the case to have a general control over the whole house, had in fact no right to enter the claimant's room, except for necessary repairs.

[JESSEL, M.R. Do you say the claimant here is a lodger or a householder?]

It is immaterial whether he is a lodger or not, as the two franchises overlap.

[BRETT, L.J. What instances are there of different franchises ever overlapping each other?]

Amongst the county voters the lists include those of freeholders and occupiers who may be occupiers of their own freeholds.

[BRETT, L.J. The duplicates are struck out by the revising barrister.]

[JESSEL, M.R. They therefore really do not overlap.

BRETT, L.J. There is no overlapping, I think, of borough franchises.]

The requirement of the 61st section of 30 & 31 Vict. c. 102, that the part of a house occupied as a separate dwelling should be separately rated was abolished by the 5th section of the Act of 1878 (41 & 42 Vict. c. 26). It is not necessary that the part of the house occupied by the claimant should be structurally severed, nor that it should be separately rated, and it is sufficient that it was separately occupied by him as a dwelling.

[JESSEL, M.R. Do you admit that a lodger is not rateable?]

Yes, an ordinary lodger, but the claimant was not such. He had the key of the outer door, and though the landlord might have some control over the house he had not any such over the room occupied by the claimant as would give him the legal occupation of it. The claimant occupied as tenant a rateable tenement: *Reg.* v. *The Assessment Committee of the St. George's Union.* (1)

(1) Law Rep. 7 Q. B. 90.

Whether therefore he was rated or not he became entitled to the household franchise.

[COTTON, L.J. Is it not rather the mode of occupation than the thing occupied, which makes the distinction between a lodger and the occupier of a dwelling-house?]

That may be so, but the real question is whether the claimant did not within the terms of the Representation of the People Act, 1867, as explained by the Registration Act, 1878, occupy as tenant a dwelling-house, that is to say, whether he did not separately occupy part of a house as a dwelling? If he did so, his right to the household franchise should not be lost because another, that is to say a lodger franchise, has also been conferred. At all events, the occupation of the claimant in this case did not differ from that of the occupiers of separate rooms in the cases of *Stamper* v. *Overseers of Sunderland* (1), and *Reg.* v. *Assessment Committee of St. George's Union* (2), and it was not the occupation of a lodger. To make it that of a lodger the landlord ought to have the exclusive control of the outer door, or by himself or his servants, render some service to the occupier—the mere fact that the landlord resides on the premises is not alone sufficient: *Smith* v. *Overseers of St. Michael, Cambridge.* (3)

[JESSEL, M.R. It is no doubt only an element, though a material one, in the matter.]

At all events, the landlord in the present case is not shewn to have had such a control over the room let to the claimant as would make the latter a lodger.

In *Morfee* v. *Novis.*

No one appeared for the respondent.

Biron, for the appellant.

[BRETT, L.J. How do you distinguish this case from that of *Bradley* v. *Baylis?*]

The claimant here had the exclusive occupation of his rooms.

[BRETT, L.J. No, that is not so found; the case states only that he had the exclusive use of his rooms.]

The inference to be drawn is that the landlord had given up all

(1) Law Rep. 3 C. P. 388. (2) Law Rep. 7 Q. B. 90.
(3) 3 E. & E. 383.

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control over the claimant's rooms. The claimant was rateable as shewn in *Stamper* v. *Overseers of Sunderland.* (1)

In *Kirby* v. *Biffin.*

Dec. 16. *Sir H. Giffard, Q.C.* (*Kingsford,* with him), was heard for the appellant, and

Bompas, Q.C. (*R. S. Wright,* with him), for the respondent. The arguments turned on the question whether the claimant occupied the rooms as lodger or not, and the same cases were cited as had been cited in the argument before the Queen's Bench Division.

Cur. adv. vult.

Dec. 21. JESSEL, M.R. These are three appeals from the decision of a Divisional Court, affirming the right of the three claimants to be put on the householders' lists as voters for a borough; and they raise very important questions as to the proper construction to be given to various Acts of Parliament bearing on this subject, and also as to a very vexed question on which there has been a great diversity of judicial opinion, that is, what constitutes a lodger as distinguished from an occupying tenant of part of a house.

The history of the legislation on this matter must be referred to in order to make my judgment intelligible.

The franchises which are in question were first conferred by the Representation of the People Act, 1867 (30 & 31 Vict. c. 102). Up to that time, there was no household franchise, except at a value of 10*l.* and there was no lodger franchise at all. The effect of that Act was to confer for the first time a simple household franchise, irrespective of value, and a lodger franchise.

Those two franchises were conferred respectively by sects. 3 and 4 of that Act. Sect. 3 enacted that: "Every man shall, in and after the year 1868, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows," viz., inter alia: Sub-s. 2. "Is on the last day of July in any year, and has

(1) Law Rep. 3 C. P. 388.

during the whole of the preceding twelve calendar months, been an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough." Sub-s. 3. "Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises;" and, sub-s. 4, "Has, on or before the 20th day of July in the same year, bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the said premises up to the preceding 5th day of January." Then the fourth section conferred the lodger franchise. The lodger was to occupy "in the same borough, separately and as sole tenant for the twelve months preceding the last day of July in any year, the same lodgings, such lodgings being part of one and the same dwelling-house, and of a clear yearly value, if let unfurnished, of 10*l.* or upwards."

It is to be observed that neither of those sections gives any definition to show what an "inhabitant occupier, as tenant," means, nor what a "lodger" means; but when we look at the conditions which the "inhabitant occupier, as tenant," had to fulfil, inasmuch as he had to pay rates and to be rated, it is clear, whatever his occupation was, it was to be a rateable occupation; and, as the law then stood, that would not include a lodger. Therefore, whatever the "inhabitant occupier, as tenant," was, he was not a a lodger, and whatever the lodger was, he was not "an inhabitant occupier, as tenant."

The next section which must be looked at is the 7th, and there it is provided that "where the owner is rated, at the time of passing this Act, to the poor rate in respect of a dwelling-house or other tenement, situate in a parish, wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:—1. After the passing of this Act, no owner of a dwelling-house or other tenement, situate in a parish, either wholly or partly within a borough, shall be rated to the poor rate instead of the occupier, except as hereinafter mentioned. 2. The full rateable value of every dwelling-house or other separate tenement, and the full rate in

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the pound payable by the occupier, and the name of the occupier, shall be entered in the rate-book.

Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings, not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate."

Those words seem to point to the case of something which would be rateable, though not separately rated. It is not impossible that the framers of that section intended only to deal with the case of premises not being separately rated, and that they were aware that there could be some kinds of apartments in a house that were capable of being separately rated.

The only other section which I think it is necessary to refer to, is the 61st, which contains a definition of "dwelling-house." It says that "'dwelling-house' shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." What that means nobody can say. Whenever you make something include something else which it does not, of course you give rise to a difficulty: and the question soon arose what is the meaning "of part of a house occupied as a separate dwelling"? In one sense, every room which is occupied separately as a dwelling is occupied as a separate dwelling, though there is a sense in which it is not so occupied, even when the man has the exclusive use of it, for it may be that he is like a guest at an inn, or a visitor at a country house, who may have the exclusive use of a room, and yet not be in the occupation of it, in a legal sense. One set of judges thought that it meant any part of a house, irrespective of the way in which a house was built. Other judges however thought that it meant any part of a house, structurally separated from the rest of the house, that is, with a door shutting off or separating that part from the rest of the house, and then separately rated to the relief of the poor. Of course, no question of that sort arises here.

Soon after the Act was passed it was discovered that the "rate-paying" clauses, as they are called, curtailed the right which it had been assumed was given to householders, without reference to the value of their tenements, to vote in the election of members to Parliament. Accordingly, the law was amended by the Poor

Rate Assessment Act, 1869 (32 & 33 Vict. c. 41), by the 3rd section of which it is enacted that the owner might agree to pay rates, being allowed a commission; and then, by the 4th section, the vestry might order the owner to be rated instead of the occupier. Then the 19th section is this: "The overseers, in making out the poor rate, shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid." Then it goes on to say, that if by any mistake any names are omitted, the overseers are to be liable to a penalty, "provided that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted." The result, therefore, of that Act appears to me to be this, that every man who occupied a rateable tenement ("hereditament" it is called there) should be deemed to be rated, and should be entitled to vote, though he was not rated, and though he had not paid rates.

Then it is necessary to pass to the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), the 14th section of which enacts that the 19th section of the prior Act of 1869 is not to be confined to the cases mentioned in the 3rd and 4th sections of that Act, but is to be of general application. The result, therefore, of these Acts, taken together, is that the householder (that is, the man who is entitled to be rated as a householder) who occupies a portion of a dwelling-house, which portion is capable of being rated or is rateable, whether he is rated or not, and whether he pays rates or not (assuming of course, that somebody pays them), is entitled to vote.

That is the position of the matter as regards occupiers. As I said before, a lodger is not rateable, and therefore there is a broad line of demarcation between a lodger and an occupier of part of a dwelling-house, for one is not rateable and the other is.

Now we come to the 5th section of that Act of 1878 which,

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inter alia, enacts as follows: "In and for the purposes of the Representation of the People Act, 1867, the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling; and the term 'lodgings' shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house. For the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately, by reason only that the occupier is entitled to the joint use of some other part. The interpretation contained in this section of 'dwelling-house,' shall be in substitution for the interpretation thereof contained in s. 61 of the Representation of the People Act, 1867, but not so as to affect any of the other provisions of the said Act relating to rating." Then the 6th section deals with the rights of lodgers. I need not read it. It is sufficient to say that it shews that lodgers are still considered to exist as a separate class, and as being entitled to the franchise as lodgers.

One part of the 5th section, therefore, gets rid of the separate rating in the definition of a "dwelling-house" by the Act of 1867, and another part gets rid of the dicta of learned judges, as to a joint use of other parts of the house. But the importance of this section is this: that a part of a dwelling-house, not structurally separated, but which is only a room in an ordinary dwelling-house may confer the household franchise; and the question we have to consider is, on what terms is a man entitled to the franchise as a householder? It follows, from what I have said before, that he must occupy a rateable tenement; and, therefore, we still have a distinction between the household franchise and the lodger franchise,—that the householder must occupy a rateable tenement, and the lodger need not, and indeed, cannot be rated.

That being so, it remains to consider when a man who occupies a rateable tenement is an occuping tenant, and when he occupies or uses it as a lodger only.

There is, probably, no question on which there has been a greater variety of judicial opinion than this. The question has arisen, first of all, under the rating Acts; secondly, it has arisen, in Ireland, under one of the Parliamentary Franchise Acts; and

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thirdly, it has arisen in this country under the Lodgers Protection Act, 1871 (34 & 35 Vict. c. 79), and all I can say is, that, having considered the cases upon it, I am of opinion it is quite impossible to reconcile them. You must prefer some to the others, for it is impossible to say that all are right; and this shews that the question is a very difficult one. Again, I have been quite unable, so far as I am concerned, to frame an exhaustive definition. Some judges have tried to do so, and, in my opinion, they have failed; and I think it wiser and safer to say that the question whether a man is a lodger, or whether he is an occupying tenant, must depend on the circumstances of each case. But that, of course, will give very little aid to revising barristers; and I think, therefore, I ought to go further and state what cases, in my opinion, are cases of occupying tenants, and what cases are cases of lodgers, and to say that the descriptions are not exhaustive, and that there may and must be cases between them, as to which it is wholly impossible to give an opinion until their details are known.

46 QBD 247, 253.

First of all, take the case of a *lodger*. It seems to me, as to unfurnished lodgings (and I will only deal with unfurnished lodgings, as it is the only class of cases with reference to which questions are likely to arise) where the owner of the house does not let the whole of it, but retains a part for his own residence, and resides there, and where he does not let out the passages, staircase and outer door, but gives to the "inmates" (I use that term for my present purpose) merely a right of ingress and egress, and retains to himself the general control, with the right of interfering—I do not mean an actual interference, but a right to interfere, a right to turn out trespassers, and so on; there I consider that such owner is the occupying tenant of the house, and the inmate, whether he has or has not the exclusive use of the room, is a *lodger*. That is one extreme case.

Now I take another case, where the landlord lets out the whole of the house into separate apartments, and lets out each floor separately, so as to demise the passages, reserving simply to each inmate of the upper floors the right of ingress and egress over the lower passages, but parts entirely with the whole legal ownership, for the term demised, and retains no control over the house;

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there, in my opinion, the inmates are *occupying tenants*, and are capable of being rated as such. That is an extreme case on the other side.

There will be an immense number of intermediate cases, which, as I said before, can only be dealt with as they arise. Take such a case as the first of those before us. Does it make any difference that the inmates have latch-keys to the outer door and also keys to the inner door? I think not. I think they are still lodgers notwithstanding. Does it make any difference that the landlord does not reside there personally, but has resident servants, who occupy, on his behalf, part of the house. I think not. I think that the inmates are still *lodgers*. Does it make any difference that the landlord does or does not repair? I think not; they are still *lodgers*.

On the other hand, suppose a landlord does not demise the whole of the house, but everything in it that can be demised, except the staircases and passages, &c., as to which he gives the inmates the right of ingress and egress, but exercises no control over, and does not reside in the house,—I think the inmates are occupying tenants. Here, again, does the fact of the landlord repairing or paying rates and taxes make any difference. I think not. Of course he has a right to enter to make such repairs, but still, in my opinion, that does not prevent the occupier being in rateable occupation.

I have given these illustrations, for the purpose of aiding those who have to consider these matters, and I think further aid will be obtained from the consideration of the actual cases themselves which we have to decide.

Now, they are three in number. The first is the case of *Bradley* v. *Baylis*, and the terms of the Special Case, as amended, are these. [His Lordship here read them from the Special Case.]

It follows, from what I have already said, that, in my opinion, the claimant in this case is a lodger. The landlord resides in the house and has a general control over it; in other words, I think the claimant lives with him as a lodger, and is properly so described. Therefore, I am of opinion that the appeal ought to be allowed, the claimant not being a householder, and not capable of being rated, but being a mere lodger.

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The next case is the case of *Morfee* v. *Novis*. [His Lordship here read the facts of that case.] The landlord occupied all the rest of the house except the two rooms let to the claimant, and the claimant had only a right of access. The mere fact of his having the key of the outer door, in my opinion, does not make him other than a lodger; he is not the landlord of the house; and, in my opinion, in this case also the appeal ought to be allowed.

10 QBD 586

The third case is the case of *Kirby* v. *Biffen*. [His Lordship here read the facts of that case.]

It follows, from what I have said, that this claimant is an occupying tenant. The landlord has no control over the house, and he does not interfere with it in any way whatever. He neither lives there himself, nor do his servants, and he does not render any service to the tenants. He lets out the whole house, in the way in which it is usually let, that is, he lets out all the rooms, with the right of ingress and egress, and the keys are in the possession of the tenants. It seems to me, that if there can be a case at all in which part of a house can be "separately occupied as a dwelling," this is that case. It is true that it was admitted in the argument and it must be treated that the passages and staircases were not demised, and that only a right of ingress and egress over them was given to the tenants, but such a demise of the passages and staircases is practically unknown; at all events, it is not the usual way of letting, and one cannot suppose that the legislature intended only to include such an extreme and peculiar case as that.

9 QBD 247

It appears to me, therefore, that in this last case the claimant was entitled to be put on the householders' list, and the appeal ought to be dismissed.

BAGGALLAY, L.J. In each of the three appeals now under our consideration, we have to determine whether the claimant is qualified in respect of his occupation of a part of a house within a borough in England, to vote for a member to serve in Parliament for that borough.

I deem it unnecessary to refer to the facts detailed in the several cases stated by the revising barristers, but will proceed at

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once to consider the statutory provisions which bear upon the questions involved.

Under the 27th section of the Reform Act of 1832 (2 Wm. 4, c. 45), the borough franchise could be acquired by the occupation, *as owner or tenant* (under certain conditions as to value and rating), of "any house, warehouse, counting-house, or other building within the borough."

The question as to what constituted a house, within the meaning of this Act, became the subject of numerous judicial decisions, more or less conflicting, all of which were considered, and reviewed in the case of *Cook* v. *Humber* (1), the effect of the decision in which was that, although a room or rooms in a house might constitute a "house," so as to satisfy the statute, it was essential, in order that the qualification should be sufficient, that there should be an actual or structural severance of such room or rooms from the other portions of the house. Erle, C.J., in the course of his judgment said: "We consider that the qualification fails, because the subject of occupation was not a house, but only a part of a house, without any actual severance from the rest."

But in *Cook* v. *Humber* (1), as was pointed out by Willes, J., in the course of his judgment in *Thompson* v. *Ward* (2), to which I shall have occasion to refer presently, no certain rules were laid down for determining what amount of severance would be sufficient to support the qualification.

In 1867, the Statute 30 & 31 Vict. c. 102, was passed. Two borough franchises were conferred by this Statute. By the 3rd section the franchise was conferred upon every man who (having qualified in other respects, which need not be more particularly alluded to), should on the last day of July in any year be, and should, during the whole of the preceding twelve calendar months, have been, "an inhabitant occupier, as *owner or tenant*, of any dwelling-house within the borough," and should during the time of such occupation have been rated as "an ordinary occupier," in respect of the premises so occupied by him, to all rates made for the relief of the poor, and should have paid a specified proportion of such rates; and it was further provided that no man should,

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73. (2) Law Rep. 6 C. P. 327.

under that section, be entitled to be registered as a voter by reason of his being a *joint occupier* of any dwelling-house.

By the 4th section of the same Statute, the borough franchise was, in like manner, conferred upon every man, who, "as a lodger should have occupied in the borough *separately and as sole tenant* for the twelve months preceding the last day of July in any year, the same lodgings, such lodgings being part of one and the same dwelling-house." By the 61st section it was enacted that the term "dwelling-house," as used in the Act, should include "any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor."

Now it appears to me clear that it was the intention of the legislature, to establish a distinction between the qualifications necessary to confer the "occupation franchise" and the "lodger franchise," as the two franchises are conveniently, though, perhaps, not very accurately, described in the margin of the authorized editions of the Statute. Nor is there, in my opinion, any sufficient reason for holding, as has been suggested in argument, that the two qualifications might overlap; in other words, that the same occupation might supply both qualifications, leaving it open to the occupier to assert his right to either or both of the franchises.

It appears to me unreasonable to suppose that it should have been intended by the legislature that an occupation of the same nature should confer "the lodger franchise," if the part of the house occupied were of the clear annual value of 10*l.*, and should confer the "occupation franchise," if it were of less value.

To acquire the "occupation franchise," by the occupation of a part of a house, it was essential that the part of the house should be "occupied as a separate dwelling," that it should be "separately rated to the relief of the poor," and that the occupier should occupy "*as owner or tenant;*" but there was no condition as to annual value. To acquire the "lodger franchise," by the occupation of a part of a house, it was essential that the part of the house should be occupied as "a lodging," that it should be of a clear yearly value of 10*l.*, that the occupier should occupy "as lodger," and that he should occupy "separately, and as sole

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tenant;" but there was no condition as to the part of the house so occupied being rated.

With respect to the necessity of the occupier occupying "*as owner or tenant,*" it should be borne in mind that this was required by the Act of 1832, and that in several cases the occupying lodger was not recognised as a tenant within the meaning of the Act, though he was doubtless a tenant in the ordinary acceptation of the word; as, for instance, in *Pitts* v. *Smedley* (1), where the claimant was held not to occupy as tenant because he had not the key of the outer door, and the landlord resided on the premises; and in *Wansey* v. *Perkins* (2), where he was held to be a lodger, and not a tenant within the meaning of the Act, because the landlord remained in possession of the rest of the house.

On the other hand, in *Score* v. *Huggett* (3), the claimant was held qualified as a tenant, because he had the key of the outer door. It must also be borne in mind that the Act of 1867, though it for the first time introduced the "lodger franchise," did not contain any definition either of the word "lodger" or of the word "lodgings." It, however, recognised the lodger as a tenant, for it required, as I have already mentioned, that he should occupy as *the sole tenant of the lodgings.*

Having regard to these several considerations, I am of opinion that the legislature used the words "lodger" and "lodgings" in their ordinarily accepted sense, as illustrated in the several cases to which I have alluded, and in other cases of a similar character, amongst which I would particularly include *Stamper* v. *Overseers of Sunderland* (4); and I am further of opinion that s. 3 of the Act of 1867 must be treated as having reference to an occupying tenant other than a lodger.

Shortly after the passing of the Act of 1867, questions arose as to the construction to be put upon the words "part of a house occupied as a separate dwelling."

Several cases, and notably those of *Thompson* v. *Ward* (5), and *Ellis* v. *Burch* (5), were brought under the consideration of the

(1) 7 M. & G. 33; 14 L. J. (C.P.) 73.
(2) 7 M. & G. 151; 14 L. J. (C.P.) 75.
(3) 7 M. & G. 95; 14 L. J. (C.P.) 74.
(4) Law Rep. 3 C. P. 388.
(5) Law Rep. 6 C. P. 327.

Court of Common Pleas, as the Court of Appeal in registration matters. The facts of these cases may be concisely stated as follows, and it is, in my opinion, important to bear them in mind:—The claimant in *Thompson* v. *Ward* (1) occupied one room in a house consisting of nine rooms; the landlord did not reside upon the premises, and the other rooms were occupied by other tenants; the claimant had the exclusive use of the room occupied by him, and the passages, staircase, and other conveniences were common to him and all the other tenants. There was one outer or street-door to the passage, which was never closed, and which was without lock or bolt. In *Ellis* v. *Burch* (1), the claimant occupied two rooms on different floors, the outer door was fastened with an ordinary lock and bolt, and was usually closed at night by one or other of the tenants; in other respects the details were substantially the same as in *Thompson* v. *Ward*. (1) In each case the part of the house in the occupation of the claimant was separately rated to the relief of the poor, and the revising barrister in each case was of opinion that the premises occupied by the claimant were not a "dwelling-house" within the meaning of the Act of 1867, and disallowed the claim. Upon appeal to the Court of Common Pleas, the judges were equally divided in opinion, and the decisions of the barristers were consequently affirmed; the appeals were argued and disposed of together. In the course of his judgment, Willes, J., expressed the opinion that it was not intended by the Act of 1867 that a man should have a vote as the occupier of a "dwelling-house" which would not have been a "house" within the meaning of the Act of 1832; and, taking *Cook* v. *Humber* (2) as his guide, he held that by the use of the words "a part of a house occupied as a separate dwelling," the legislature meant something which could properly be called a dwelling-house, and which was structurally, or at least practically, separated from the rest of the dwelling of which it formed part; and inasmuch as in neither of the cases then under appeal there was any such structural or practical severance, he was of opinion that the claimants were not entitled to vote. Brett, J., was of opinion that, notwithstanding the exclusive use

(1) Law Rep. 6 C. P. 327. (2) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

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by each of the claimants of a part of the house, the joint use by them with the other tenants of the passages, staircases, and other conveniences, prevented the exclusive use of the part being an occupation of that part as a separate dwelling; and in this opinion Willes, J., apparently concurred, though he rested his decision upon the grounds already mentioned. Bovill, C.J., and Keating, J., were of opinion that the language of the 61st section was enacted for the purpose of getting rid of the difficulties which had arisen out of the decisions in *Cook* v. *Humber* (1) and in *Henrette* v. *Booth* (2), which was supposed to conflict, but, in my opinion, did not conflict with *Cook* v. *Humber* (1), and of avoiding for the future the determination of the question in any particular case, whether "a part of a house" should be treated as "a house." It would appear that the words "occupied as a separate dwelling" were regarded by the learned judges (whose expressed opinions I am now considering), as amounting to no more than requiring that the occupation as a dwelling should be separate as distinguished from joint, or, as intimated by Keating, J., as repeating the provision at the end of the 3rd section, that no man should, under that section, be entitled to be registered as a voter by reason of being a joint occupier of any dwelling-house.

Where so many varying opinions were expressed, it may perhaps be permitted to me to say that I regard the occupation in both the two cases to have been an occupation, *as tenant of a part of a house separately rated to the poor rate, but not occupied as a separate dwelling*, and therefore not sufficient to confer the right of voting upon the occupier. This was apparently the view taken by Brett, J.

The case of *Boon* v. *Howard* (3) came before the Court of Common Pleas shortly after *Thompson* v. *Ward* (4) and *Ellis* v. *Burch*. (4) In it the judges were again equally divided in opinion as to the interpretation to be given to the words "occupied as a separate dwelling." Keating, J., and Denman, J., adopting the views expressed by Bovill, C.J. and Keating, J., in *Thompson* v. *Ward* (4), and *Ellis* v. *Burch* (4), while Honyman, J., concurred with Brett, J., in adopting the views expressed by the

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.
(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.
(3) Law Rep. 9 C. P. 277.
(4) Law Rep. 6 C. P. 327.

(1) 8 C. B. (N.S.) 698.
(2) 9 C. B. (N.S.) 793.

latter in the same cases. A question also arose in this case as to the rating of the premises which were the subject of occupation; and upon this question also the learned judges were divided in opinion.

In this state of judicial opinion, the statute 41 & 42 Vict. c. 26, was passed in 1878. By the 5th section of that statute (sub-s. 2), it was enacted that, for the purposes of the Act of 1867, the term "dwelling-house" should include any part of a house *where that part is separately occupied as a dwelling*; and, by sub-s. 4, that this interpretation of "dwelling-house" should be "in substitution for the interpretation thereof contained in s. 61 of the Representation of the People Act of 1867, but not so as to affect any of the other provisions of the said Act relating to rating;" and it was also enacted (sub-s. 3), that, for the purposes of any of the Acts referred to in that section (amongst which were included the Act of 1832), where an occupier was entitled to the sole and exclusive use of any part of a house, that part should not be deemed to be occupied otherwise than separately, by reason only that the occupier was entitled to the joint use of some other part. We have to consider the effect which these provisions have upon those previously in force. The same section, sub-s. 2, also contains a reference to lodgings, to which it is not necessary for me more particularly to allude, than to say that the statute evidently intended to keep up the distinction between the occupation franchise and the lodger franchise.

In delivering judgment in the several cases in respect of which these appeals now before us have been brought, Denman, J. is reported to have said that he could not doubt that the object of the legislature in passing the Act of 1878 was not to confer a new franchise or enlarge the definition of a "dwelling-house," but to decide that for the future the view taken by Keating, J., and himself of the meaning, under the Act of 1867, of the word "dwelling-house," was the view which the legislature intended should be adopted, or, as he further expressed his meaning, that the expression "separately occupied," was not to imply the occupation of everything exclusively, but that it was sufficient if that part of the occupation which was relied on as giving the franchise was separately occupied as a dwelling, whatever joint occupation there

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might be of the staircase, washhouse, and other conveniences; and in the view so expressed by Denman, J., Bowen, J. expressed his concurrence. Whether such views are in accordance with the true interpretation of the statute is what we have now to determine.

Omitting the reference to rating, the change in the language interpreting the term "dwelling-house" is very slight. Under the Act of 1867, it is to include "*any part of a house occupied as a separate dwelling;*" under that of 1878, "*any part of a house separately occupied as a dwelling.*" Is there any difference in meaning between the expressions "occupied as a separate dwelling" and "separately occupied as a dwelling?" If this change in the definition of what the term "dwelling-house" is to include had been merely intended to remove a doubt which had arisen from conflicting judicial decisions as to a previous definition, we should expect to find some direct intimation in the statute that such was the intention of the legislature; but no such intimation is to be found. Again, had there been any such intention, we should hardly have found such an *apparent* identity of meaning in the two definitions. The inference which I draw from the language of the later statute is, that it was not the intention of the legislature *to explain* the definition given in s. 61, but *to enlarge* it, so as to make it include the meaning which the Chief Justice and Keating, J., had attributed to that definition in *Thompson* v. *Ward* (1); and I think that such is its true effect, though I regret that the intention was not expressed in more clear language. Under the former definition, the subject of occupation was to be occupied as a separate dwelling; in other words, it was to have all the incidents of a separate dwelling, all the necessary conveniences, including access to the street; such incidents would be wanting, if these conveniences were enjoyed only in common with others; but if, under the new definition, there is a *separate* occupation of the subject-matter of occupation, that is, of the room or rooms occupied, and such subject-matter is so occupied *as a dwelling*, the terms of the definition are, as it appears to me, satisfied, even though some of the incidents of a dwelling may be enjoyed in common with others. And this view of the interpreta-

(1) Law Rep. 6 C. P. 327.

tion of the definition given in sub-s. 2 of s. 5 of the Act of 1878, is supported by the provision in sub-s. 3 of the same section, that where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately, by reason only that the occupier is entitled to the joint use of some other part.

To this extent I assent to the conclusion at which Denman, J., and Bowen, J., have arrived as to the practical effect of the Statute of 1878; and I am of opinion that, in each of the three cases now under consideration, there was an occupation of a part of a house, and that such part was separately occupied as a dwelling. But we have further to determine the character of the occupation. Was the occupation of each claimant that of a lodger or of a tenant, within the true meaning of the 3rd section of the Act of 1867? If his occupation was as a lodger, then, for the reasons I have already assigned, he is not entitled to the franchise as an occupying tenant, in which character the several claims have been made. But how are we to determine whether an occupier is a lodger or not? In my opinion, each case must depend upon its particular circumstances; and it is impossible to do more than to lay down certain general rules for guidance, which must be applied by those upon whom the duty devolves. I can suggest no better rules than those which the Master of the Rolls has mentioned. Adopting them, and having regard to the decisions to which I have referred, and in which the distinction has been drawn between a lodger and a tenant who is not a lodger, I am of opinion, though I cannot say that I express a very confident opinion, under circumstances which afford so much room for doubt, that the claimant in each of the first two cases (Bradley in the one case and Morfee in the other), occupied the room or rooms, which were in fact occupied by him, in the character of a lodger, and not in that of a tenant other than a lodger, and that consequently in neither case was the occupation franchise acquired.

But, as regards the claimant in the third case, *Kirby* v. *Biffen*, it appears to me that his occupation is that of an occupying tenant under s. 3. It remains, however, to be considered whether the part of a house so occupied by him was separately rated to

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the relief of the poor, so as to satisfy the condition to that effect required by the statutes. During the argument on this case, I felt considerable doubt upon the subject; such doubts were to some extent founded upon the provisions of the 7th section of the Act of 1867, but, upon further consideration of that section, and having regard to the 19th section of the Poor Rate Assessment and Collection Act, 1869, and the 14th section of the already mentioned Act of 1878, I am of opinion that, so far as the qualification of the claimant to vote as an occupying tenant is dependent upon the premises occupied by him being separately rated to the relief of the poor, he is entitled to the franchise. The combined effect of the two last-mentioned sections is, in my opinion, to make the provisions of previous statutes as to rating *practically* inoperative, so far as they affect the qualification necessary to entitle an occupying tenant to the borough franchise. The claimant need not be actually separately rated; it is sufficient if the landlord is rated; but under the statutes referred to, he is to be considered as if he was separately rated, so far as his right to the franchise is concerned. I have already stated that he is, in my opinion, entitled to the franchise, so far as the nature and character of his occupation are concerned; and I am consequently of opinion that his name has been properly placed upon the list of voters.

BRETT, L.J. It seems to me that nothing could be more difficult and nothing more involved, than these statutes, and that that difficulty arises from the fact of Parliament insisting upon saying that things are what they are not.

The question here arises with regard to the borough franchise, and is whether certain claimants are entitled to be put on the register as householders, or whether they are lodgers.

On the one side it was said that none of these claimants were householders within the meaning of the statute, and that if any of them were, they were not rated or rateable, and that, therefore, even although they were householders, they ought not to be put upon the register. On the other side it was said that they were all householders, and that even if some of them might be lodgers they were nevertheless householders; and that some of these

franchises overlapped each other. I ventured to say at the time that I did not think any of the borough franchises in any of the statutes overlapped each other; but I was forgetful for the moment of a case, in which a majority of the Court had held that "a house" under the statute of 2 Wm. 4. c. 45, and "a dwelling-house" under the statute of 30 & 31 Vict. c. 102, did, as it were, overlap each other; that a man might be the occupier of a house which would give him a vote under the statute of William, and at the same time be the inhabitant occupier of the same house—a "dwelling-house"—which would give him a vote under the Statute of Victoria. No doubt that, to a certain extent, is true. The question arose in the case of *Townsend* v. *Overseers of St. Marylebone* (1), where it was held that if a man claimed for a dwelling-house, and it was found that his occupation would not give him a vote under 30 & 31 Vict. c. 102, he might, under that claim, support his vote by saying that he was the occupier of a house, which would give him a right under 2 Wm. 4, c. 45; and the majority of the Court held that that was so. I remember at the time dissenting from that view. I thought that the descriptions of the franchise in the two statutes were to be taken to be descriptions of separate rights, and that if a person chose to claim under one of those descriptions, and he could not support it, he ought not to be allowed to qualify himself by saying that he was entitled under another of the descriptions. I confess that I am of the same opinion still, not that if the case were to come before me, sitting in this Court, I should think it right to propose to overrule that decision after it has lasted so long; but, except in that particular case, I think it is impossible to say that any of these franchises overlap each other. Consequently people cannot be *lodgers*, and at the same time *householders*, in respect of the same subject-matter of occupation. It seems to me that the franchise given to lodgers and the franchise given to householders are two separate and distinct qualifications. The question therefore is whether the claimants in these cases can properly be said to be householders.

I shall, first of all, eliminate cases which seem to me not to depend at all upon the statute of 30 & 31 Vict. c. 102, namely,

(1) Law Rep. 7 C. P. 143.

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cases where there is a structural separation, as in the case of chambers in the Inns of Court, or of flats in Victoria Street, and which have been held to be separate tenements, or houses.

Now s. 3 of 30 & 31 Vict. c. 102, gives the franchise to any man who has been for the stipulated period an inhabitant occupier of any dwelling-house. Two matters are there enunciated. First, there is the thing which he is to occupy, and that is a "dwelling-house;" secondly, there is the mode in which he is to occupy it, and that is as an "inhabitant occupier." The section imposes also the condition that he has during the time of such occupation been rated as an ordinary occupier. Then there is another condition, namely, that he has paid the rate. So that really there are four conditions: a condition as to the house to be occupied; a condition as to the mode of occupation; a condition as to being rated in respect of that occupation; and a condition as to payment of such rate.

With regard to the claimants in the present case it seems to me that both the thing to be occupied and the mode of occupation must be determined before you come to the question of rating at all, for if the thing which has been occupied is a lodging, and if the mode of occupation has been to occupy it as a lodger, the question of rating under these statutes does not arise at all, for a lodger cannot be rated at all by any law which is known to this country; therefore, really the question whether the claimant is a householder or a lodger must be decided before you come to the question of rating.

Under the 3rd section, he must have occupied a dwelling-house. If Parliament had left the matter there, it would have been impossible for anybody, using the English language in its ordinary sense, to have said that if a man occupies two rooms in a house he occupies a house. In the case of the chambers in Inns of Court, or flats, they may properly be called houses, because they are built as houses, but rooms in a house which is built as a house would not have been a house. With regard to the Inns of Court, and to the buildings that are built in flats, the only difficulty was the fact of their being built with what I call an inside staircase. Supposing they had been built as Swiss houses are built, with staircases outside, running up the outside wall, you would have

gone up the outside staircase, which would have been common to everybody to go up, and when you had got up to the level of your own landing you would have opened the door of your house, built as a separate house, having no communication with any other house. The staircases, however, being inside, under the same roof, presented a difficulty, of course, until one came to consider it; but when one came to consider that these staircases were built only for the purpose of affording ingress and egress, it became apparent that it made no difference whether they were inside or out, and that the premises were really separate houses. But then as to houses not so constructed there is the 61st section, which has given rise to the first difficulty in these cases. The 61st section enacts that "the term 'dwelling-house,'"—that is the term used in the 3rd section—"shall include any part of a house occupied as a separate dwelling and separately rated to the relief of the poor." That gave rise to the difficulties which have been alluded to; but we need not consider what was the meaning of that particular section, because it is repealed. We have now in s. 5 of the statute of 1878 a definition which is to replace it, that is, that "'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling;" and then you have this further complication, that "where an occupier is entitled to the sole and separate use of any part of a house, that part shall not be deemed to be occupied otherwise than separately, by reason only that the occupier is entitled to the joint use of some other part." It seems so me clear that that latter part was put in, in order to meet the question of what was called "structural severance." But there will still remain the difficulty sometimes of determining whether the part of a house which a claimant occupies is separately occupied as a dwelling-house, a difficulty which I think we have not to solve on the present occasion, but I will give an illustration which will shew what I mean,—if a person occupies two rooms which are not on the same floor, but are separated by a staircase which is not demised to him, and in one of those rooms he and his family sleep, and in the other he and his family live, it will, I think, be difficult to say whether he occupies any one room as a dwelling-house. You do not dwell in your bed-room; you do not dwell in your sitting-room;

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you dwell in the two things jointly; but where those two things are separated by something which does not belong to you, I doubt myself whether you can be said to "dwell" in either of them. In the schedule to one of the present cases it is stated that some of the persons are on one floor and some on the other; but the learned revising barrister has put them into the same schedules. To my mind, he ought not to have put things into a schedule unless they are exactly similar to the principal case, and I think the Court must assume that they are alike; and, therefore, with regard to this point it must be left open.

Then, besides that 3rd section of the Act of 1867, so interpreted, there is the 4th section, which gives the lodger franchise, that is, where the person "as a lodger has occupied in the same borough, separately and as a sole tenant, for twelve months preceding the last day of July in any year, the same lodgings, such lodgings being part of one and the same dwelling-house." Now, the persons who framed the last Act seem not to have been able to leave that alone, and in order to make that clearer the Act of 1878 says "'lodgings' shall include any *apartments* or *place of residence*, whether furnished or unfurnished, in a dwelling-house." So that, according to that, he is to be a lodger who has occupied any apartments or place of residence in a dwelling-house, such apartments or place of residence being part of one and the same dwelling-house. As to how that explains anything which has gone before passes my comprehension. One is still left to conjecture what are "lodgings," and what is a "lodger."

Although, in ordinary parlance, a "lodging," and a "house" must be separate and different things, yet when the legislature says that a part of a house can be a house (which, in truth, it cannot be), why, then it is possible that the same thing may be the subject-matter of two different qualifications,—being occupied by a man as a householder, and being occupied by him as a lodger. The thing occupied may be the same, namely, a room, and you look to the mode of occupying it in order to determine the qualification.

What then is the difference between the modes of occupying a room as a lodger, or as a householder? To occupy the room as a lodger, you must lodge in another man's house. There

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cannot be an exhaustive definition of what will make a man a lodger, but the matter has been considered very much in three cases, all of which are in the 7th Manning and Grainger. In those cases, the distinction was made to turn upon the ownership of the key of the outer door. In one case the owner of the house had the key of the outer door, and he resided in the house (1):—Held, that a person who occupied the rooms in that house was a lodger with him. In another of those cases, the owner had let part of the house, reserving no actual control over it, and he did not keep for himself the key of the outer door (2):—Held, that the person occupying the part of the house occupied it as a householder and not as a lodger. And the third was a case where the owner had the key of the outer door, but the person who occupied part of the house had a key also (3):—Held, that such person was a lodger. If you substitute in those cases the consideration of the owner of the house preserving a control over it, then the distinctions drawn in those cases will remain as very good guides. If the owner of the house reserves to himself a control over it (which he does if he resides in part of it, and where there is only the use of the passages and staircases given to the inmates to whom he lets the rest of it, or, if he does not reside in it, yet if he, by his servants, performs any duties in the house, or undertakes a certain control:) any person who occupies only a part of that house as his tenant, may be properly said to be a lodger with him. But if the owner of the house has entirely left the house, and has given up the actual occupation of it to other people, not reserving any part of the actual occupation of it to himself, nor any control over any part of it, then, although in truth those persons are not occupying a house, but only part of a house, they may, if other conditions are fulfilled, be said to occupy "a dwelling-house" within the definition of 41 & 42 Vict. c. 26. Cavillers may say that such nice distinctions look exceedingly like nonsense. I can only answer that if judges seem to talk nonsense, it is because parliament has written nonsense. Supposing a man remains in the house and lets off several rooms to different persons who are then his lodgers, and he afterwards

(1) *Pitts* v. *Smedley*, 7 M. & G. 85. (2) *Score* v. *Huggett*, 7 M. & G. 95.
(3) *Wansey* v. *Perkins*, 7 M. & G. 151.

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lets off all the rest of the rooms and leaves the house and preserves no actual control over it, so that he is not to go into it, either by his servants or by himself, then those persons who were before lodgers have become by that fact householders. But supposing during the qualifying year one of those lodgers leaves, and the owner thereupon (as assuredly he must) resumes the control over that unlet part, according to my view of the statutes, immediately by that act of his those people left in the house who have been householders become lodgers again. Therefore, to my mind it will be necessary, notwithstanding what we are deciding in the present case, for revising barristers to see that during the whole qualifying year in these cases the whole house has been occupied by persons, under conditions which make them householders, and if during the year the whole house has not been so occupied, and the owner has had a control over it, then none of those persons have been householders for the qualifying year. Now in one of the sets of cases before us the whole house has been let out in apartments during the whole time, with the exception only of the staircase. The landlord has gone away and has given up the actual control over the house; therefore, it seems to me that, the persons who occupy those apartments must be held to be inhabitant occupiers of a dwelling-house within the meaning of the statutes.

In the other two sets of cases where the owner has reserved to himself a control over the house, the persons who occupy parts of that house are lodgers; therefore, they could not claim in the mode in which they have claimed, and inasmuch as the value was not enough for lodgers, they cannot be put upon the register at all.

Then with regard to those persons who are thus held to be lodgers, the question of rating does not arise at all, but with regard to those who are thus held by us to be householders there arises the question of the rating, which is quite as difficult as the other.

Now these persons are to be taken to be the occupiers of separate dwelling-houses. But then, by the Act of 1867, they must have been rated, and have paid their rates. The 3rd section is not repealed. They have not been rated. But we are to see whether they are to be deemed to have been rated, although they are not.

The first matter as to rating is said to have been contained in the 7th section. The first part of that 7th section did away with the power to rate the owner under Sturgis Bourne's Act, the Small Tenements Act. Then it afterwards dealt with this particular case: "Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings, not separately rated, the owner shall be rated in respect thereof to the poor-rate." That was the part of the section which gave rise to the case of *Stamper* v. *Overseers of Sunderland.* (1) There, the overseers of Sunderland had rated the occupiers of separate rooms, and these occupiers objected to being rated, as they preferred not to have a vote, to being rated and have a vote. It was shewn, I think, clearly in that case, that if such occupiers could be held to be lodgers in the ordinary acceptation of the word, the enactment did not apply to them, and the owner was the only person who could be the occupier, and as such rated, but this was not what was wanted. It was contended, therefore, that this part of the enactment was intended to apply to cases where separate rooms or lodgings were in such a condition as that the occupiers of them would have been rated (inasmuch as the Small Tenements Act was done away with), unless this part had been put in to protect them; and it was said that it did protect them from being rated, and that in those cases they should not be rated, but that the owner should be rated instead of them, they thereby losing the franchise.

The whole Court decided that those persons were not lodgers in the ordinary sense, that they were persons who occupied tenements in such a manner that they would have been rateable under the statute of Elizabeth, but that by this part of the 7th section they were protected.

Now, two of the judges in that case said that if these people were not householders, they might be (although not lodgers within the ordinary sense) *lodgers* within the Act; in other words, that everybody occupying a part of a house who was not a householder within the meaning of the Act would be a lodger. That probably is a true view of these statutes.

However, these persons who are held to be the occupiers of

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separate tenements, ought to be rated, because, by the 3rd section of the Act of 1867, unless they are rated they cannot vote; but then there is the 32 & 33 Vict. c. 41, and by the 4th section of that Act the vestry may, where the hereditaments are under a certain value, order that the owners shall be rated instead of the occupiers. Then, the owners being rated instead of the occupiers, if the matter stood there, the occupiers could not be put upon the register; but the Act goes on, in the 19th section thus: "The overseers, in making out the poor-rate, shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid." But supposing the overseers did not put the names of the occupiers in the rate-book, then, they could not be deemed to be rated; therefore there is this proviso; "Provided that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted." Therefore, the negligence of the overseers is not to alter the rights of the occupier to the franchise. But then there seems to have arisen some difficulties as to whether certain persons would be within that section or not; and it appears to me that the 14th section of 41 & 42 Vict. c. 26, was passed to meet some suggested difficulty of that kind, but it is said that the stipulation in the 19th section of the Act of 1869, is to be applicable to all cases where the owner is rated instead of the occupier,—that is, where the owner is rated in a case where, if it had not been for the Statute 32 & 33 Vict. c. 41, the occupier would have been rated. Therefore, in the case before us, of *Kirby* v. *Biffen*, where we hold that the persons are occupiers, it seems to me that it is a case in which, if the vestry had made the order, the owner would be a person to be rated instead of the occupier. Then, if that be so, whether the occupier's name has been put in the rate-book or not, the occupier who is not rated is to be deemed to be rated. If the occupier is the person who is to

be deemed to have been rated, then it follows that the payment of the rate by the landlord is the payment by him on behalf of the occupier. Consequently, in the case of *Kirby* v. *Biffen*, where we hold the persons to be separate occupiers of a separate dwelling-house, we must hold that they have fulfilled the condition of having been rated and having paid the rate, and therefore that they are entitled to be put on the register.

It is unnecessary to determine another question which has been raised, and that is, where the person has claimed as an occupier, the revising barrister, if he should be of opinion that the claimant is not an occupier but lodger, can put him on the register as a lodger; but I should think there is quite as much difficulty about that as about any part of the rest of this matter; and I am therefore glad it is not required that we should decide that on the present occasion.

COTTON, L.J. I agree with the other members of the Court, and if this were not a case of such general importance, I should say nothing more; but, looking at the importance of the case, I think it necessary to state shortly the view I entertain.

The question we have to consider is this, Whether the claimants in these appeals, under the Act of 1867 (30 & 31 Vict. c. 102) as amended by the Act of 1878 (41 & 42 Vict. c. 26), are entitled to the franchise as householders?

The Act of 1867 gives, by two sections, two different franchises, both arising from the occupation of part of a house, that is to say, a householder franchise and a lodger franchise, the lodger franchise being given by the 4th section to a person who, "as a lodger, has occupied, separately and as sole tenant for the twelve months preceding the last day of July in any year, the same lodgings, such lodgings being part of one and the same dwelling-house." The 3rd section gives to "inhabitant occupiers, as owners or tenants" of a dwelling-house the household franchise.

There was a definition of "dwelling-house" in s. 61 of the Act of 1867, which gave rise to considerable difficulties, and s. 5 of the Act of 1878, with one exception, deals only with the definition of the thing which is to be occupied in order to give the household franchise. It removes the difficulty in some cases as to a person

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who occupies a part of a house separately, and who has the joint use of another part of it. I will not deal with that, as it is unnecessary to do so; but, independently of that, it simply is a definition of what may be a house for the purpose of entitling the occupier to the franchise as a householder; and to remove the difficulty as to the necessity of some structural severance in the part of a house which is occupied by a person who claims to be a householder, it in effect provides that if a man occupies part of a house, even though there is no structural separation, he may be entitled to the household franchise, if otherwise he performs the conditions of the statute. The section defines the thing which may give the occupier of it the household franchise; the mode of occupying it to be dealt with under the previous Act.

The first question we have to consider is this, Whether a man who is a lodger, and in that character occupies a part of a house, has a right to say, "Although I am not entitled to the franchise as a lodger, I am entitled to it as a householder"? That, I think, cannot be the fair construction of the Act of Parliament. In my opinion, if a man is a lodger he cannot come under s. 3 of the Act of 1867, and be treated as a householder in respect of the same thing as that which he occupies as a lodger. It is true that a lodger may be a tenant, and is recognised as a tenant in s. 4, because the words are, "as a lodger, has occupied in the same borough, separately, and as a sole tenant, the same lodgings." And in s. 3, sub-s. 2, the words are, "An inhabitant occupier, as owner or tenant, of any dwelling-house within the borough." But it will be remembered, that to entitle a man to the lodger franchise that thing which he occupies as such must be of a particular value. Is it probable that that which, when occupied as a lodging must be of a particular value to give the lodging franchise, can in respect of the same occupation as a lodger give the household franchise, although it is not of that value, but of less value? Besides, in s. 5 of the Act of 1878, not only is there a new definition of "house," but there is a definition—not of "lodger," but of "lodgings." "The term 'lodgings' shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house." That, in my opinion, shews that the lodger franchise was to be continued, independently of the householder

franchise, and it also shews, I think, that the thing may be occupied by a lodger as lodgings, even although it comes within the definition which has already been given of that which constituted a house for the purpose of the household franchise.

My opinion, therefore, is that you must construe section 3 of the Act of 1867, as giving the franchise to the inhabitant occupier of a house, who occupies it otherwise than as lodger; and if you find that a man has in fact occupied the thing as a lodger, he must make out that he is entitled to the franchise under the lodger clause, and he is not entitled to have it under the householder clause.

As this is my opinion, what we have to consider in the several cases here is, whether the different claimants are lodgers, or whether they are householders, within the meaning of the Act. Of course, in what I have said I am not dealing with the question of a man being entitled to the household franchise under the old Reform Act; but I am simply dealing with the question of a person who has claimed the franchise by reason of his occupation of that which is within the meaning of this Act of 1878 a house, that is an "imaginary" or statutory house.

Now, what is a *lodger?* I do not intend to try to give that which will be an exhaustive definition of a lodger. I have had to consider it several times in this Court, and, in my opinion, there is involved in the term "lodger," that the man must lodge in the house of another man and lodge with him. With respect to lodging in the house of another man, there is no difficulty about that. What constitutes his lodging with the landlord is the difficulty. In my opinion, it is not necessary that the person with whom he lodges, that is his immediate landlord, should live in the house to make him a lodger. Nor is it necessary that the immediate landlord should have the exclusive control over the key of the outer door; but, in my opinion, some control over the house must be exercised by the person in whose house a man lives to make him a lodger. There may be an infinite variety of cases which may occur, and to attempt to exhaust them, in my opinion, would be futile. What we have to do here is to see whether, having regard to the facts which are stated, it can be said that in these cases the claimants are or are not lodgers.

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Here, in the two first cases there is very clear control retained by the immediate landlord. In the second of these cases, the landlord lives in the house, occupying the whole of it, excepting two rooms, in which the claimant lives. In my opinion, there can be no doubt that this claimant is a lodger in the house of the other man. In the other of these two cases, it is found that the immediate landlord does exercise a control over the whole house; and as this is so, in my opinion, in both those cases the claimants are lodgers; they occupy parts of the houses as lodgers, and therefore they are not entitled to be put on the register as householders.

The third case seems to me to be different. It is found that the immediate landlord does not live in the house, that he has let all the rooms in the house, though he has not let the staircases (but it is in accordance with the usual custom not to let the staircases); but to give a right to the tenants of the several rooms to use the staircases in common. This however is found, the immediate landlord retains an obligation to do all the painting and repairs, and he pays all rates and taxes, and that "save as aforesaid, he does not, by himself or his servants, retain the control and dominion over the house." In my opinion, the fact that he does the painting and repairs is not sufficient to enable him to say that he exercises such a control over the house as to make those who are living there lodgers in his house. Therefore, in this case I am of opinion that the claimant is entitled to claim the household franchise, so far as the portion of his occupation is concerned. The difficulty in his so claiming is that he was not rated, and there is a provision in the 3rd section of the Act of 1867 that "during the time of such occupation he must have been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises." Brett, L.J., has gone so fully through the various sections which bear on this rating question, that I do not intend to go over the same ground again. It is sufficient for me to say that s. 14 of the Act of 1878 does make s. 19 of 32 & 33 Vict. c. 41 general; and we must deal with the matter as if the claimant in this case had been rated, and payment of the rates by the landlord is to be treated as

payment by the tenant, and sufficient to satisfy s. 3 of the statute of 1867.

Consequently, in my opinion, the claimant in the third appeal is entitled to be put on the register as a householder.

LINDLEY, L.J. In order to decide these cases, the following Statutes have to be construed and applied, viz.:—The Representation of People Act, 1867 (30 & 31 Vict. c. 102), ss. 3, 4, 7, 61; Poor Rate Assessment Act, 1869 (32 & 33 Vict., c. 41), ss. 3, 4, 19; Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), ss. 5, 14. Of these Statutes, the first and third are in pari materiâ, and relate to the representation of the people and to the registration of voters. The second is a Poor Rate Assessment Act, modifying the rating clauses of the first Act, but not otherwise affecting it. The above enactments can be best studied by being divided into two groups, as follows:—Group 1 (Qualification group): 30 & 31 Vict. c. 102, ss. 3, 4, 61; 41 & 42 Vict. c. 26, s. 5. Group 2 (Rating group): 30 & 31 Vict. c. 102, s. 7; 32 & 33 Vict. c. 41, ss. 3 & 19; 41 & 42 Vict. c. 26, s. 14.

The effect of the first group of sections is this:—1st. Two new classes of voters are created, viz.:—

(1.) The occupier class, who must be rated to the poor, but whose tenement may be of any value.

(2.) The lodger class, who need not, and, indeed, cannot be rated, but whose lodging must be worth 10*l.* a year, unfurnished.

A careful study of the Acts of 1867 and 1878 shews, I think, conclusively, that these two classes are intended to be kept distinct; but no definition of "occupier" or of "lodger" is given, although there is a description of the tenement which an occupier must have, and of the lodging which a lodger must have.

The tenement which an occupier must have is described as a "dwelling-house" (1867, s. 3), which, by the Act of 1878, s. 5, includes any part of a house where that part is separately occupied as a dwelling.

The lodging which a lodger must have is described in the Act of 1867, s. 4, as a lodging, being part of a dwelling-house; which, by the Act of 1878, s. 5, includes any apartment or place of residence, furnished or unfurnished, in a dwelling-house; and such

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lodging must, by the Act of 1867, s. 4, be occupied by the lodger separately and as sole tenant.

These descriptions have much in common; they both apply to persons who, in some sense, are tenants; they both apply to one or more rooms in one house, and they both require separate occupation. Moreover, "lodging" implies dwelling, so that if attention is only paid to the room occupied, and to its separate occupation as a dwelling, no distinction can be found between what is required to confer the franchise on the occupier of part of a house, and what is required to confer the franchise on a lodger.

Value makes the difference in some cases, but not in all; a "lodging" must be of the clear yearly value, if let unfurnished, of 10*l.* or upwards. From this it follows:—(1.) That one or more rooms in a house, separately occupied by the same person, and of the value of 10*l.*, unfurnished, may confer, either the one franchise or the other on their occupier. (2.) That the same rooms, if not of this value, cannot confer the lodger franchise, but may confer the occupier franchise.

I proceed now a step further. The Act of 1867, section 3, requires the occupier to occupy as "owner or tenant;" and the same Act, sect. 4, requires the lodger to occupy separately "and as sole tenant." But the occupier must also occupy separately by the Act of 1878, sect. 5; so that, as far as separate occupation by a tenant or lodger is concerned, there is no difference between the two classes of voters.

The foregoing examination of the sections now under consideration leads to two conclusions, viz.:—(1.) That the two classes of voters are contrasted, and are intended to be kept distinct; and (2.) That when dealing with tenants or lodgers occupying one or more rooms of one and the same house, the only difference to be found between them is the difference, if any, between a person occupying as tenant and a person occupying as lodger.

I pass now to the group of rating enactments, in order to discover what light, if any, they throw on the question. The Act of 1867, sects. 3 and 61, required the occupier to be rated to the poor, and his tenement to be separately rated; and where a house was *wholly* let out in apartments or lodgings not separately rated

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when the Act passed, the owner of the house was the person to be rated, and not the occupiers of the apartments or lodging (see sect. 7, and *Stamper* v. *Overseers of Sunderland* (1)).

The 61st section of the Act of 1867 is repealed by sect. 5 of the Act of 1878; and sect. 7 of the Act of 1867 is greatly modified by sects. 3 and 4 of the Act of 1869 (32 & 33 Vict. c. 41); for by sects. 3 and 4 of this Act, the owner of a house, let out in apartments of certain specified values, may become the person liable to pay the rates, which would otherwise be payable by their occupiers. Moreover, by sect. 19 of the same Act (as modified by sect. 14 of the Act of 1878 (41 & 42 Vict. c. 26), whenever a rate is collected from the owner or occupier, or whenever the owner is liable to the payment of the rate instead of the occupier, the name of the occupier is to be entered in the rate-book, and he is then to be deemed to be duly rated for the purposes of the electoral franchise, and the omission of his name from the book does not disqualify him. Whether, therefore, the occupier of a room in a house pays the rate of the room, or whether his landlord pays it, the occupier is, for the purpose of the franchise, sufficiently rated if his name is entered in the book; but his name ought not to be so entered, unless the room he occupies is a rateable hereditament. A mere lodger, however, is not, and never was, rateable in respect of his lodgings; the occupation by a lodger of a lodging not being within the Poor Rate Acts. The group of rating sections, therefore, point to the distinction between occupation as a tenant rendering him liable to be rated, and occupation as a lodger. But what this distinction is cannot be gathered from the language of the Statutes themselves.

The distinction, then, between tenants who are not lodgers and tenants who are lodgers, must be discovered from other sources than the Statutes, and it is extremely difficult to draw the line between them. At the same time, the word "lodger" involves the idea of lodging with some one else from whom he hires his lodging; whilst the word "tenant" does not involve, although it does not exclude this idea; and this difference gives the clue to the distinction which the Statutes have made. Taking this difference as a guide, it appears to me that where a house is

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wholly let out in unfurnished apartments, separately occupied by tenants, and their landlord does not reside in the house, and has no servant in the house to look after it for him, the tenants are rateable and are not lodgers; whilst, on the other hand, where a house is let out in unfurnished apartments to tenants, and their landlord resides in the house, or has a servant in it, to look after it for him, then it appears to me that such tenants are not rateable and are lodgers. This is the best conclusion I can draw from the numerous decisions relating to this question and from the enactments to which I have more particularly referred; and, applying this test to the three cases before us, I think the decision of the Court below ought to be affirmed in Kirby's case and reversed in Bradley's case and Morfee's case.

Bradley v. *Baylis* and *Morfee* v. *Novis, Decision reversed.*
Kirby v. *Biffen, Decision affirmed.*

Solicitor for appellant Bradley: *R. C. Green.*
Solicitors for respondent Baylis: *Baylis & Pearce.*
Solicitors for appellant Morfee: *Tamplin, Taylor, & Joseph.*
Solicitor for respondent Novis: *S. F. Langham, for F. A. Langham, Hastings.*
Solicitors for appellant Kirby: *Harvey, Oliver, & Co.*
Solicitor for respondent Biffen: *S. Price.*

W. P.

[IN THE COURT OF APPEAL.]

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NUTH, APPELLANT; TAMPLIN, RESPONDENT.

Parliament—Borough Vote — Lodger Franchise — Declaration — Primâ Facie Evidence—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), s. 4—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 23.

Sect. 23 of the Parliamentary and Municipal Registration Act, 1878, which enacts that in the case of a person claiming to vote as a lodger the declaration annexed to his notice of claim shall, for the purposes of revision, be primâ facie evidence of his qualification, is general, and applies to lodgers claiming for the first time under s. 4 of the Representation of the People Act, 1867, as well as to claims under s. 22 of the Parliamentary and Municipal Registration Act, 1878, by lodgers retaining the same lodgings in successive years.

CASE stated by the revising barrister of Marylebone.

The appellant claimed under the 4th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), to have his name inserted in the list of voters for the borough of Marylebone as a lodger. The claim was in the Form H, No. 2, in the schedule to the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), and was duly witnessed and published by the overseers in the list of lodger claimants. The appellant did not appear personally in support of his claim, nor was evidence of any kind tendered in support of it.

No formal objection in writing to the claim was made under the provisions of s. 39 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), by or on behalf of any person whose name was on the list of voters for the borough.

It was contended on behalf of the appellant that s. 23 of the Parliamentary and Municipal Registration Act, 1878, applies to all lodger claimants as well those who claim in respect of lodgings for the first time under s. 4 of the Representation of the People Act, 1867, as those who claim under s. 22 of the Parliamentary and Municipal Act, 1878, as retaining the same lodgings in successive years (1), and that the appellant was entitled to

(1) By s. 22 of the Parliamentary and Municipal Registration Act, 1878, "Where a person is entered in respect of lodgings on the register of voters for the time being in force, and desires to be entered on the next register in re-

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have his name inserted in the list of voters for the borough of Marylebone as a lodger, without any further evidence being adduced in support of his claim other than that furnished by the declaration.

The revising barrister decided that s. 23 of the Parliamentary and Municipal Registration Act, 1878 (1), does not apply to the case of persons who claim under s. 4 of the Representation of the People Act, 1867, and not under s. 22 of the Parliamentary and Municipal Registration Act, 1878, and that it is necessary for a person so claiming, whether objected to or not, to appear either himself or by his agent and to produce evidence in support of his claim other than that (if any) afforded by the declaration, and he accordingly disallowed the claim of the appellant.

The question for the Court was, whether this decision was right.

Nov. 24, 1881. *Bompas, Q.C.*, for the appellant. The words of s. 23 of the Parliamentary and Municipal Registration Act, 1878, are perfectly general, and though there are dicta in *Pickard* v. *Baylis* (3) that they apply only to such lodger claimants as are mentioned in the preceding s. 22, there is no decision to that effect, as it was not necessary to the case to decide the point. The lodger claimant has to make a full declaration, and a witness to his identity is necessary, so that it may well have been thought that a claim made with these formalities should be treated as primâ facie evidence by the declaration.

E. Clarke, Q.C., for the respondent. The judgments of Lord Coleridge and Denman, J., in *Pickard* v. *Baylis* (2), turned on this point—if s. 23 of the Parliamentary and Municipal Registration Act, 1878, is treated as applicable to both classes of lodgers, the new claimants will obtain the franchise on easier

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spect of the same lodgings, he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situated on or before the 25th day of July. The overseers shall on or before the last day of July make out a list of all persons so claiming . . . ."

(1) By s. 23 of the Parliamentary and Municipal Registration Act, 1878, "In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be primâ facie evidence of his qualification."

(2) 5 C. P. D. 235.

conditions than other claimants, both as regards the mode of claiming and the difficulty of objecting.

[BOWEN, J. Sects. 38 and 39 of the Parliamentary Registration Act, 1843, are incorporated by s. 30 of the Representation of the People Act, 1867, so that the new lodger claimants can be objected to in Court.]

Still the objector would have the difficult task of displacing a primâ facie case. A householder omitted by the overseers must come before the revising barrister and prove his claim, and it would be an anomaly if a lodger need not do so. Sect. 23 immediately follows a section referring exclusively to old lodger claimants, and is followed by one which relates to persons already entered on a list, and it ought to be read in the limited sense put on it by the majority of the Court in *Pickard* v. *Baylis*. (1)

[BOWEN, J. In s. 25, which imposes a penalty for a false declaration "in respect of a claim to vote," can it be said that those words do not apply to both classes of lodgers.]

It must be admitted that those words are general, but it may still be contended that the grouping of the sections and the general scope of the Act shew that the words in s. 23 are limited.

Bompas, Q.C., in reply.

DENMAN, J. (after stating the facts as they appear in the case, and the contentions on either side, continued): The revising barrister must, I think, have been influenced in his decision by a notion that certain dicta or certain reasons given by Lord Coleridge and myself in *Pickard* v. *Baylis* (1) were authorities in favour of the view that s. 23 of the Parliamentary and Municipal Registration Act, 1878, does not apply to the case of new lodger claims.

Now I must confess that at the time when that case was argued I did entertain a strong opinion from the juxtaposition of the clauses of the Act, and seeing that s. 23 follows immediately upon a section which relates only to old lodger claims, and is followed by a section which deals with persons already on lists, that s. 23 should be construed in a qualified sense, and was only applicable to the case of old claimants and not to that of new ones. But my

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recollection is to the effect that I did not feel at that time that we had that particular point raised in the case (if I recollect rightly it was started rather from the bench than by counsel), or that it had been sufficiently discussed to enable us to rule one way or the other. At any rate it seems to me that nothing occurred in that case, and no such judgment was given, as to prevent our approaching this as a new point. Having now heard the case fully argued, my opinion is that the view taken by Lindley, J., of the applicability of that clause was the sounder view, and that my dictum in support of the contrary opinion was wrong.

The words of s. 23 are very strong and comprehensive, and it certainly is a right doctrine to apply to the consideration of all Acts of Parliament that, unless there is strong reason for it, words should not be imported into an Act of Parliament either by way of extension or limitation. Now it has been argued that it is highly improbable that the legislature should have intended s. 23 to apply to a new lodger claimant, for several reasons, one of which was that it would give such a claimant an advantage which other new claimants do not possess. I think that argument has been met by observations which have been made in the course of the case, and looking at the whole of the enactment I do not see that the argument is a very strong one. A lodger is bound to make his claim in a very specific form, to insert a quantity of matters with great minuteness, so that persons concerned may know whether he is a proper claimant, and to have a witness who vouches his belief in the correctness of the claim by rendering himself liable to punishment if he makes a false statement. That argument therefore seems to me to fail, and there is a stronger argument on the other side, which is, that if we put a limited construction on s. 23 we should be construing identical words in two sections close to one another—ss. 23 and 25—in a different sense. It is admitted that s. 25 applies to both old and new claims; the words of s. 23 prima facie apply to both, and yet we are asked to put a limited construction on s. 23 on a speculative view that the intention of the legislature would have been unlikely to be more generous to one class of voters than to another. I think no sufficient ground has been brought forward to make us adopt that

construction of the words of the clause, which on the face of it are clear and, looking at the safeguards which are enacted, can be interpreted according to their natural meaning without creating any real or serious difficulty. That being so, I think the appellant is entitled to the franchise, and ought to succeed in his appeal.

BOWEN, J. I am of the same opinion, and for the reasons I indicated in the course of the argument, which I need not now repeat. The words of the section seem to me to be plain, and the only thing that would make me hesitate is the opinion expressed in *Pickard* v. *Baylis* (1), strongly by Lord Coleridge, and by my Brother Denman with some reservation, in favour of the contrary view. But for the language there used I should entertain the clearest opinion, and my Brother Denman, after hearing this case fully argued, now thinks that the view then taken by the majority of the Court cannot be adopted. The divergence of Lindley, J., from the opinion expressed by Lord Coleridge must also have some weight on the question of whether it should be treated as open to review. In spite of the authority which Lord Coleridge's opinion must have, I agree with that now expressed by my Brother Denman that the revising barrister's decision was wrong, and that the appellant is entitled to succeed.

A. M.

The respondent appealed.

Dec. 16, 1881. *Charles, Q.C.*, for the respondent. Before the Parliamentary and Municipal Registration Act, 1878, the lodger claimant was exposed to the hardship of making a fresh claim every year, although it was in respect of the same lodgings, and he had every year to attend the Revision Court to support his claim whether objected to or no. The 22nd section of that Act was passed to remove this hardship, and the 23rd section which makes the declaration annexed to the notice of claim evidence, is intended therefore to apply only to such lodger claimants as are put on the list of claimants by the overseers according to the

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preceding 22nd section as pointed out by Lord Coleridge, C.J., and Denman, J., in *Pickard* v. *Baylis*. (1)

[BRETT, L.J. To give s. 23 this limited construction you must insert the word "such" before the words "a person," or other words limiting it to the claimant mentioned in the 22nd section.

JESSEL, M.R. What is the use of the declaration if the 23rd section is not to apply to new lodgers as well as old? Why should s. 25 impose a penalty for making a false declaration if it is not to be evidence of any kind?]

If the 23rd section is to be general it will put the new lodger claimant in a better position than other claimants and relieve him of the obligation to attend and prove his claim. According to s. 30 of the Representation of the People Act, 1867, he need not deliver his claim to the overseers before the 25th of August, and unless that section makes s. 39 of the Registration Act, 1843, applicable to such a case, no one can object to his claim. That section applies to the case of a person omitted from a list by the overseers although he has claimed, and enables him to support his claim and to be objected to. It does not however touch the case of a person whose name actually appears in a list, and therefore by sending in a fresh claim every year a lodger could escape objection. Further *Pickard* v. *Baylis* (1) decided that the list of lodger claimants is not the list of voters, and s. 30 does not apply to an omission from the list of claimants but only from that of voters.

Bompas, Q.C., appeared for the appellant, but was not called upon.

JESSEL, M.R. The question we have to decide is the meaning of the 23rd section of the Act of 1878 (41 & 42 Vict. c. 26), which is as follows:—"In the case of a person claiming to vote as a lodger the declaration annexed to his notice of claim shall for the purpose of revision be primâ facie evidence of his qualification." It was contended by Mr. Charles that that section was not to be read literally, but that it had a limited meaning. It was said that the section was to be limited by inserting in it some

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such words at its commencement as these, viz., "In the case of such a person as is mentioned in the preceding section," or "In the case of a person who had been already entered in respect of lodgings on the register of voters."

Now any one who contends that a section of an Act of Parliament is not to be read literally must be able to shew one of two things, either that there is some other section which cuts down its meaning, or else that the section itself is repugnant to the general purview of the Act.

As I understand, the argument of Mr. Charles was addressed to the last proposition. It was said that if we read the section literally the result will be that the person who makes the declaration required by the 23rd section will be entitled to go upon the list of voters without the opportunity of objection. Before I deal with that argument I will look at the position of the new lodger voter before the passing of this last Act. He had to send in a claim with a declaration; but there was no penalty attached to the making of a false declaration. He would then have to attend either in person or by proxy before the revising barrister to support his claim with evidence as to the nature of his qualification, and anybody on the list of voters for the borough could oppose the claim without any previous notice, for as it seems to me the 39th section of the Registration Act of 1843 is embodied in the Representation of the People Act, 1867, as to persons claiming to be on the lodger's list. If that was so, before the Act of Parliament of 1878, and the lodger claimant could be opposed then, I cannot find anything in that Act to prevent his being opposed now. All that the enactment says is: that in the case of a person claiming to vote as a lodger the declaration shall be primâ facie evidence of his qualification; but then the public have the protection given by the 25th section, which renders the man who makes a false declaration guilty of a misdemeanour and liable to fine and imprisonment, so that it puts the man who makes the declaration very much in the same position as a man who makes an affidavit. Then if such declaration is to be primâ facie evidence of the qualification, anybody who wishes to oppose him may put in rebutting evidence. That is the only result. It is suggested that that will put the voter in a worse position than he

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was in before, but I think not. In the first place, if he has a very clear case he has no reason to expect that rebutting evidence will be brought forward to oppose his claim; and if by chance it should be, why should not the agent who appears on his side support or protect his claim, and if necessary ask for an adjournment so as to give the voter an opportunity to support his claim; or if the voter pleases he may, if he anticipates objection, still come and prove his claim as formerly, for he is not deprived of the right he had before of having his witnesses in attendance to prove his case. Therefore it appears to me there is no inconvenience or difficulty.

In the present instance there was an agent appearing for the claimant, and there was no opposition, and we must not anticipate that people will oppose bonâ fide claims merely because they are verified by declaration. It appears to me that no case has been made out for rejecting the claim, and I rest my decision on the broad ground that the literal wording of an Act of Parliament is to be read and carried into execution, unless it can be shewn on one or other ground which I have mentioned that it is contrary to the intention of the legislature. In my opinion the decision of the Divisional Court was correct, and ought to be affirmed.

BAGGALLAY, L.J. In my opinion the reasons given by Denman, J., in the Divisional Court were quite sufficient for the purpose of reversing the decision of the revising barrister, and I adopt them entirely as the ground of my decision. In doing so, I in no way dissent from what has been expressed by the Master of the Rolls, but on the contrary, I assent to it. There is only one point on which I desire to make any observation. In this case the claim was made and published in due form, and as it was not objected to before the revising barrister, it was, I think, his duty to give effect to the declaration annexed to the notice of claim, there being no rebutting evidence.

BRETT, L.J. In this case the question arises entirely on the construction of the 23rd section of the Registration Act of 1878 (41 & 42 Vict. c. 26.) With regard to the duty of the revising

barrister, it strikes me as necessary to observe that there is no register before him, and all that he has to do, if the overseers have done their duty, is to revise lists. There is one case and one only where he has to revise something which is not a list, and that is in the case where the overseers have accidentally omitted to put the names of claimants upon any list.

With regard to boroughs, the list of voters is made out by the overseers. Persons, however, may be omitted from that list, and they are to give notice of their claim, whereupon the overseers are to make out a list of such claimants. There would, therefore, be the general list of voters made out by the overseers, and the list of such claimants. With regard to lodgers, there are lodgers who assert that they were on the list of the year before. They are to make a claim which states that they were on the list of voters for the borough the year before in respect of the same lodgings. The names of those persons are, by s. 22 of this Act of 1878, put in a list by the overseers, and that list is to be revised by the revising barrister, but subject to this stipulation (brought into s. 22 by reference to the former registration Acts), that anybody who objects to them must give them notice of objection before the list comes before the revising barrister. Therefore, with regard to that list, the revising barrister has to revise it, and if no notice of objection has been given, he is to allow the names of such lodgers to be in the list of voters from which the town clerk makes out the register. With regard to persons who claim as lodgers, but who were not on the list of the former year, their mode of claiming is not determined by the statute of 1878 at all; but by s. 30 of the Act of 1867. They are to send in their claims to be registered as lodgers, and thereupon the overseers are to make out a list of such claimants, and all such claimants are bound to support and make out their claims before the revising barrister, and as it seems to me any voter on the list has a right, according to s. 39 of the Registration Act, 1843, introduced into the process of revision by s. 30 of the Act of 1867, then and there to contest the claim, and if the claimant makes out a primâ facie case, to answer it by evidence. It is true, it is said, that the person so opposing must then and there give a notice in writing to the revising barrister of his intention to oppose,

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but every revising barrister knows that the writing is a form which is never in practice insisted upon. Therefore it comes to this, that any voter on the list may object that the claimant has not made out his claim, and if he has made out a primâ facie case may answer it. There is nothing in the statute of 1878 which gets rid of that obligation; therefore, to my mind, the new lodger claimant, as he may be called, is bound to make out his claim, although there has been no notice of objection to it.

Then how is this s. 23 to be applied. It applies most certainly to the lodger claimants who have been on the register before, and when notice of objection has been given to them they have only to put in their declaration, which is primâ facie evidence of their qualification, and the person objecting to them will have to meet that primâ facie case. Does it apply to a new lodger claimant? The words of the section are as large as they can be. "In the case of a person claiming to vote as a lodger," that comprises the new lodger claimant, "the declaration annexed to the notice of claim shall for the purpose of revision"—his claim is there for the purpose of revision—therefore in terms this section applies to him as much as it does to the other lodger claimant, and the declaration is to be received as primâ facie evidence of his claim. If he, or anybody for him, is present at the revision, the section, to my mind, presents no difficulty at all. What struck me as a difficulty was whether he must be present or somebody must be present for him, but I think that only applies to the question of evidence. I think he still is bound to make out his claim under s. 30 of the Act of 1867, and supposing he should not be there himself and no one should be there for him, it seems to me that it would be the duty of the overseers at once to point to this declaration, and if the overseers should not be present it would be the duty of the revising barrister to take notice of there being a claim and declaration by the lodger claimant, and that that declaration is primâ facie evidence of his qualification, and consequently it would be the duty of the revising barrister to allow the claim unless there should be somebody there who can shew that the claim is wrong. If there should be somebody there who can shew that the claim is wrong, then it

would be the misfortune or the negligence of the claimant if he were not there, or had nobody there to support his case.

Therefore it comes to this, that no previous notice of objection need be given. The new lodger claimant is bound to support his claim. His claim may be answered, and if he is not there it is his own fault. Therefore the Act of Parliament does not work the hardship against him which at one time suggested itself to my mind. It seems to me that the words of the 23rd section are applicable and apply equally to the case of a lodger claimant who alleges he was on the old register as to the case of one who is claiming for the first time.

COTTON, L.J. I am of opinion that the judgment appealed from was right, and must be affirmed. The question is as to the construction of s. 23 of the Registration Act of 1878. It has been conceded, and could not be contested, that the construction put upon it by the Court below was in accordance with the terms of the section taken by itself. Is there any other section in this Act which restricts the meaning and operation of that section? None has been pointed out, and in my opinion there is none. Then is there such a manifest inconvenience in applying this section to the case of lodgers claiming for the first time as to render it right to restrict its meaning? It simply does this, as I read it, it makes this declaration primâ facie evidence of the qualification of the lodger claimant when otherwise the onus would have been on him to support his claim when made for the first time. That is the construction put upon it by the Court below, and there is no manifest inconvenience, I think, in giving it that construction.

It may possibly place the lodger claimant in a somewhat better position than others, but it is not on that ground for us to say he is not entitled to the benefit of the enactment. In my opinion the section applies to a declaration made by a lodger claiming for the first time as well as to lodgers who have been already on the register.

LINDLEY, L.J. I am of the same opinion. In order to understand the 23rd section it appears to me only to be necessary

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to look at it and s. 25, and the form of the lodger claim in the schedule to No. 2. These appear to me to be perfectly consistent, and there is no escape from their obvious meaning, and the application of the declaration to all lodger claimants. It is said we ought to restrict the general language of the enactment because of the inconvenience or hardship which may arise to lodgers who, if they act on the faith of it, may be met by some objection or some evidence which it would be necessary to rebut, without having had any notice. Whether that is so or not practically, I think, it is better and more convenient to the lodgers that they should be able to act upon their declaration being taken as primâ facie evidence and run the risk of any unforseen objection, than that they should have to attend the court of the revising barrister to support their claims. There is absolutely no reason for cutting down the general language of the section, and upon that general language the Court below acted, and, I think, rightly.

The appeal, therefore, ought to be dismissed.

Appeal dismissed. (1)

Solicitor for appellant: *H. J. Ives.*

Solicitor for respondent: *G. S. Joseph.*

(1) On the application of Bompas, Q.C., the Court made an order under s. 38 of 41 & 42 Vict. c. 26 for the payment of the costs of the appeal by the town clerk, who had been named as respondent.

W. P.

ADAMS, APPELLANT; BOSTOCK, RESPONDENT.

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Nov. 23.

Parliament—Borough Vote—Notice of Objection—Omission of Place of Abode of Objector—Mistake—Power of Amendment—41 & 42 *Vict. c.* 26, *s.* 28, *sub-s.* 2.

An objector described himself in the notice of objection as "on the list of parliamentary voters for the parish of H.," but omitted to insert his place of abode. He was a solicitor practising at H., was clerk to the magistrates and coroner, and had resided at H. all his life. It was admitted that the insertion of the words "of H." would have sufficiently described the objector's place of abode, and the revising barrister found as a fact that no one had been misled or deceived by the omission:—

Held, that under the circumstances the omission was a "mistake" within the meaning of 41 & 42 Vict. c. 26, s. 28, sub-s. 2, which the revising barrister had power to amend.

APPEAL from the revising barrister for the borough of Horsham.

Arthur Reid Bostock objected to the name of Frend Adams being retained on the list of voters; the notice of objection was as follows:—

"To Mr. Frend Adams.

"I hereby give you notice that I object to your name being retained on the list of persons entitled to vote at the election of a member to serve in Parliament for the Parliamentary Borough of Horsham, on the following grounds, viz., 'That you have not occupied twelve months to July 15th.'

"Dated this 25th day of Aug., 1881,

(Signed) "Arthur Reid Bostock,

"On the list of parliamentary voters for the

"Parish of Horsham.

"Mr. Frend Adams,

"Horsham."

Frend Adams objected that the notice of objection was invalid as it did not state the place of abode of the objector, and that it could not be amended.

The borough of Horsham comprises the greater part of the parish of Horsham, and is wholly contained in it, and in every instance in which the residence of the voter was within the parish

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of Horsham his place of abode was described as "Horsham" only in the list of voters.

The abode of Arthur Reid Bostock, the objector, was described in the list of voters as "Horsham"; there was no other person of the same name on the list of voters, and it was admitted that if he had inserted in the notice of objection the words "of Horsham" the notice of objection would have been valid.

The objector was a solicitor practising at Horsham, and held the offices of clerk to the magistrates and coroner; he had resided in the parish all his life and was well known. The names of other thirteen persons were objected to by him, and the validity of the notices of objection depended on the decision in this case. There was no evidence that any of the persons objected to was misled or deceived by the omission, and the revising barrister held as a fact that none of them were so misled or deceived. The revising barrister held that the omission was a "mistake" within sub-s. 2 of 41 & 42 Vict. c. 26, s. 28 (1), and corrected the mistake by inserting the words "of Horsham" in the notice of objection. It being admitted that if the omission was one that was capable of amendment the votes must be expunged, they were accordingly expunged by the revising barrister.

Bompas, Q.C., for the appellant. The question turns on the meaning of the words "may correct any mistake" in 41 & 42 Vict. c. 26, s. 28, sub-s. 2. "Mistake" does not include "omission." By 6 & 7 Vict. c. 18. s. 40, any mistake proved to have been made in any list was capable of amendment, and by s. 101 of the same Act no misnomer or inaccurate description was to vitiate a claim or objection. The provision in the Act of 1878 was substituted for the 40th section of 6 & 7 Vict. c. 18.

[DENMAN, J., referred to *Pickard* v. *Baylis* (2).]

There the revising barrister refused to amend, and it was held that he was not wrong, as he was not bound to do so. The forms in the schedule to the Act of 1878 are by s. 8 made part of the Act, and Form I. shews that in a notice of objection the objector's

(1) By 41 & 42 Vict. c. 26, s. 28, sub-s. 2, a revising barrister "may correct any mistake which is proved to him to have been made in any claim or notice of objection."

(2) 5 C. P. D. 235.

place of abode should be given. The place of abode is an essential part of the notice of objection: *Woollett* v. *Davis* (1); in that case Wilde, C.J., says, in a considered judgment, "The legislature plainly intended that the notice to be given should therein set forth all the requisite particulars to inform the party to whom the notice was to be given of the place of abode of the objector." The word "mistake" should be interpreted literally; otherwise all the sub-sections of s. 28, except the first, would be unnecessary. A "mistake" is where a person intending to put down one thing puts down another: *Luckett* v. *Knowles* (2); *Bendle* v. *Watson* (3); *Pickard* v. *Baylis* (4); it must be a mistake in the notice itself, not a mere error of the person giving the notice. [He also cited *Ballard* v. *Robins.* (5)]

A. L. Smith (*J. F. Clerk*, with him), for the respondent. An omission is a mistake amendable under sub-s. 2 of 41 & 42 Vict. c. 26, s. 28: *James* v. *Howarth* (6); in that case Lindley, J., expressly says, "An omission is as much a mistake as the putting in something which ought not to be inserted." [He was stopped by the Court.]

DENMAN, J. I think that the revising barrister was right in making the amendment, and that this appeal must be dismissed. I have no doubt that the power of amendment conferred by the Act of 1878 was intended to include so slight and unimportant a matter. In this case the objector was well known in Horsham and held several official positions there; there was no other person of the same name on the parliamentary list of voters; and in his notice of objection he only omitted that which it is apparent from the italics in the form in the schedule to the Act may be omitted. Besides, it has been found as a fact by the revising barrister that no one was misled or deceived by the omission. If there is any conflict between the older cases and *James* v. *Howarth* (6), I should hold that the former have been overruled by the latter.

BOWEN, J. I am of the same opinion. It is not necessary for

(1) 4 C. B. 115.
(2) 2 C. B. 187.
(3) Law Rep. 7 C. P. 163.
(4) 5 C. P. D. 235.
(5) 3 C. P. D. 92.
(6) 5 C. P. D. 225.

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us to decide that every omission of the address in the notice of objection is a mistake which may be amended; we only say that under the circumstances the revising barrister was not wrong in thinking that he had power to amend. Had I been in his place, I should have been inclined to exercise my discretion as to amendment in the same way.

Appeal dismissed with costs.

Solicitor for appellant: *Charlton.*
Solicitors for respondent: *Robinson, Preston, & Stow.*

J. S.

Dec. 8.

[IN THE COURT OF APPEAL.]

EX PARTE EDWARDS.

Solicitor and Client—Liability of Town Agent of Country Solicitor to pay to Client amount of Debt received in an Action—Summary Jurisdiction of the Court.

The town agent of the solicitor of the plaintiff, in an action in which judgment had been recovered for a debt, refused to pay over to the plaintiff the amount of the debt which had been received by him from the sheriff under a writ of fi. fa., on the ground that he was entitled to retain such amount for a debt due to him from the country solicitor of equal amount.

The country solicitor had no lien on such amount against his client, the plaintiff:—

Held, affirming the decision of the Queen's Bench Division, that the Court in the exercise of its summary jurisdiction over its own officers would order the town agent to pay over the amount of the debt to the plaintiff.

In such a case the Court will exercise its summary jurisdiction, although there be no fraud imputed to the town agent.

THE Queen's Bench Division, in the exercise of its summary jurisdiction over its own officers, ordered Mr. Johnson, a solicitor, (who had acted as the town agent of Mr. Raynes, the country solicitor, in an action brought by a Miss Edwards against a Mr. Whitwell, and in which she had recovered judgment), to pay over the amount of the debt received by Johnson from the sheriff of Essex, under a fi. fa. issued on such judgment, and which Johnson refused to pay to her, as he claimed a right to retain it against what was due to him from Raynes, on the general account between

them. Raynes had no right of lien against Miss Edwards, and he joined with her in the affidavits which were now made in support of the application on which the order was made. The case is reported (1) where the facts are fully stated in the judgment of the Court.

Mr. Johnson appealed from such order.

Tatlock, for the appellant. Johnson was employed by Raynes as his London agent, to bring the action for Miss Edwards. The contract of employment was between Raynes and Johnson, and there was no privity between the latter and Miss Edwards, and therefore she could not have sued Johnson for the money which he had received as the solicitor and town agent in the action: *Robbins* v. *Fennell.* (2)

The case of the *New Zealand and Australian Land Company* v. *Watson* (3) also shews that where there is no such privity of contract between the principal and the sub-agent the action cannot be maintained. Besides, a London agent of a country solicitor is not the sub-agent of the client—although the Court has sometimes interfered summarily in the case of a solicitor, inasmuch as he is an officer of the Court, it has never done so, except where there has been some fraud or misconduct on his part, or the money has been received by him improperly, as in *Robbins* v. *Heath.* (4) The case of *Hanley* v. *Cassam* (5) was relied on in support of the applicant Miss Edwards, but *Robbins* v. *Heath* (4) was decided after that case, and the decision of *Robbins* v. *Heath* (4) was on the ground that the money had been improperly received in that case by the town agent. That is not so in the present case, for here he had authority to receive it. The case of *In re Lord* (6) is an express authority that the Court will not exercise its summary jurisdiction over an officer unless in a case of palpable fraud: *Ex parte Jones* (7), and *Gray* v. *Kirby* (8) shew that the country solicitor and not the London agent is liable to the client.

(1) 7 Q. B. D. 155.
(2) 11 Q. B. D. 248.
(3) 7 Q. B. D. 374.
(4) 11 Q. B. 257, n.
(5) 10 L. T. 189.
(6) 2 Scott, 131.
(7) 2 Dowl. 161.
(8) 2 Dowl. 601.

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Dodd, appeared for Miss Edwards, but was not called upon.

JESSEL, M.R. I am of opinion that this appeal cannot be sustained and that it ought never to have been brought. In this case the town agent of the country solicitor receives in the action the debt for which the action was brought and which is money due to the plaintiff. The plaintiff owes nothing to the country solicitor, so she is entitled to receive the debt, but the town agent refuses to pay it either to her or to the country solicitor, because he says that the country solicitor owes him more than the amount of such money. The first question is whether the town agent is so entitled to keep the plaintiff's money, and if he is not so entitled, the next question is whether the Court has summary jurisdiction over him to order him to pay it over to the plaintiff. Now I think it quite clear that the town agent cannot retain this money, and I think it equally clear that an order can be made under the summary jurisdiction of the Court that he should pay it over to the plaintiff. The town agent simply received the money as the solicitor in the action, and when he had so received it his duty was to pay it to the country solicitor, and he had no right whatever to retain money which he knew belonged to the plaintiff, unless the country solicitor had a lien upon it for a greater amount. I thought that this was clear; it is in accordance with what has been the constant practice in equity, and I am glad to find both from *Hanley* v. *Cassam* (1) and from what the Master has reported, that it is a practice which has prevailed throughout the profession. Then as regards the summary jurisdiction of the Court, I never heard the suggestion which has been made that such jurisdiction should only be exercised where the solicitor has been guilty of fraud. The very point was decided in *Hanley* v. *Cassam*. (1) There there was an application that an attorney who was the London agent of a country solicitor, should pay to the plaintiff in the cause the amount of a debt he had received in the action. There was no suggestion of any fraud and yet the Court of Exchequer granted the application. If authority were wanted, there it is, and certainly it is as much for the benefit of the solicitor as it is for the public that there should be this summary

(1) 10 L. T. 189.

jurisdiction, by which he is relieved from the expense of an action. It having been decided that the jurisdiction is a general one and without limitation, it is clear that this appeal cannot be supported and it must therefore be dismissed.

BRETT, L.J. I am of the same opinion, and I think that there was no colour for this appeal. This is a case in which the London agent of the country solicitor, by virtue of his authority as such, proceeded to execution in the action and obtained thereby payment of the debt and costs for which the action was brought. An application was then made in the ordinary form that he should answer the matters in an affidavit and pay over the amount of the debt to the plaintiff. The country solicitor had not any lien, but the town agent assumed a right to retain the money as against what was due to him on the general account between him and the country solicitor. The question is whether the Court in the exercise of its summary jurisdiction can in such a case order the town agent to pay this money to the plaintiff. It is urged that it cannot do so, because there is no priority between the town agent and the plaintiff, nor any relation between them of principal and agent. Granting this, I do not think it follows that therefore the Court cannot exercise its summary jurisdiction over a solicitor who is an officer of the Court. It has been laid down by so great an authority as Lord Tenterden, in *Ex parte Bayley* (1) "that the Court exercises a jurisdiction over attornies, and that it is to be exercised according to law and conscience, and not by any technical rules." It is argued however, that the Court would not exercise its jurisdiction in such a case as the present because there was no fraud. I agree in thinking that the town agent had no fraudulent mind in acting as he did, but the Court, however, in my opinion, exercises its jurisdiction, even where there is no fraud. The case of *In re Lord* (2) has been relied on as an authority that the Court will not exercise its summary jurisdiction over one who is an officer of that Court, unless in a case of palpable fraud; but what was meant by the decision in that case was that, where such jurisdiction was sought for by an applicant on account of an alleged fraud, the Court would not act, unless a case of such fraud was

(1) 9 B. & C. 691. (2) 2 Scott, 131.

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clearly made out. That case, therefore, does not apply, and there is no decision or authority that the Court will not summarily interfere in a case of this kind, unless there be shewn to be some fraud. It would, I think, be contrary to law and conscience to allow the solicitor, who had received money in an action which he knew to be the plaintiff's, to pay out of that money a debt which was due from some one else. I should have thought that no reported case was needed in support of this, but the case of *Hanley* v. *Cassam* (1) is an authority in point, and that case was referred to and acted on by the Court of Queen's Bench in *Robbins* v. *Heath*. (2)

COTTON, L.J. There are two questions raised in this case. The first is whether Mr. Johnson, the town agent, had any right to retain this money in order to satisfy a debt due to him from the country solicitor; and the second is whether it can be recovered by Miss Edwards by this kind of summary application. I am of opinion that the practice is against the appellant on both points. I agree with Brett, L.J., that there is no imputation of fraud; but I think that when Mr. Johnson received this money he received it as the solicitor in the action, and that therefore when he seeks to apply it, not in payment to the plaintiff, but to satisfy a debt due to himself, the Court has jurisdiction to interfere summarily to prevent this being done. There is no ground for saying that Mr. Raynes, the country solicitor, has any lien or right to the money, for he has joined in the affidavits made in support of Miss Edwards's application.

Appeal dismissed.

Solicitor for appellant: *Johnson.*
Solicitor for Miss Edwards: *John W. Sykes.*

(1) 10 L. T. 189. (2) 11 Q. B. 257, n.

W. P.

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Nov. 30.

Perjury—Evidence—Indictment—Information—Corrupt Practices Prevention Act, 1863 (26 & 27 *Vict. c.* 29), *s.* 7.

By s. 7 of the Corrupt Practices Prevention Act, 1863, no person summoned as a witness before any commissioners appointed under the Corrupt Practices Acts shall be excused from answering any question relating to corrupt practices forming the subject of inquiry on the ground that the answer would tend to criminate himself, "provided that no statement made by any person in answer to any question put by or before such commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding civil or criminal:"—

Held, that the exception in the proviso did not apply to an ex officio information by the Attorney-General for perjury.

ARGUMENT of rule for a new trial.

The defendant was tried at the Lincoln Summer Assizes, 1881, upon an information by the Attorney-General in the Queen's Bench Division for perjury alleged to have been committed before commissioners, appointed under 15 & 16 Vict. c. 57, to inquire into the existence of corrupt practices at parliamentary elections in the borough of Boston.

The defendant having been summoned before the commissioners as a witness, in answer to questions put by them, swore that he had not spent any money in bribery, nor had he given any money to persons to be expended for the purpose of bribery, at the last election of members of parliament for the borough.

Subsequently the defendant admitted in answer to questions by the commissioners that his former answers were untrue, and gave particulars of various sums which he had expended in bribery.

At the trial the defendant's answers before the commissioners were put in evidence in support of the charge of perjury, and the defendant was convicted.

A rule nisi for a new trial was obtained by the defendant in the Queen's Bench Division, on the ground that his admissions before the commissioners were not admissible in evidence, "by reason of the statute 26 & 27 Vict. c. 29, operating by way of inducement and threat to induce and compel the said defendant

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to make such admissions, and also because such admissions were obtained by inducements and threats held out to the said defendant by the commissioners."

The questions raised on this rule were fully argued, and the Court took time to consider their judgment. Subsequently the Court desired counsel for the Crown and for the defendant to re-argue the case on the question of whether or not the exception to the last proviso in s. 7 of 26 & 27 Vict. c. 29 (1) applied to the case of an information by the Attorney-General.

Sir F. Herschell, S.G. (*Sir H. James, A.G.*, and *A. L. Smith*, with him), accordingly shewed cause. The exception in the proviso at the end of s. 7 of the Corrupt Practices Prevention Act, 1863, applies to an information by the Attorney General. The word "indictment" should be construed, not in the technical sense of an accusation by bill found by a grand jury, but in the popular sense of "criminal proceedings." The object of the legislature was clearly to afford the fullest possible protection to witnesses summoned before the commissioners, but only in the

(1) By s. 7 of the 26 & 27 Vict. c. 29, no person who is called as a witness before any commissioners, appointed under the 15 & 16 Vict. c. 57, to inquire into corrupt practices at elections, shall be excused from answering any question relating to corrupt practices at any election forming the subject of inquiry by the commissioners on the ground that the answer may criminate or tend to criminate himself, provided that where any witness shall answer every question relating to the matter aforesaid which the commissioners shall require him to answer, and the answer to which may criminate or tend to criminate him he shall be entitled to receive from the commissioners a certificate stating that he was so required to answer and had so answered. "And if any information, indictment, or action be at any time thereafter pending in any Court against such witness for any offence under the Corrupt Practices Prevention Acts, or for which he might have been prosecuted or proceeded against under such Acts committed by him previously to the time of his giving his evidence, and at or in relation to the election concerning or in relation to which the witness may have been so examined, the Court shall, on production and proof of such certificate, stay the proceedings in such last-mentioned information, indictment, or action, and may at its discretion award to such witness such costs as he may have been put to in such information, indictment, or action. Provided that no statement made by any person in answer to any question put by or before such .... commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding civil or or criminal."

event of their having told the truth; if the witness has given false evidence it was intended completely to deprive him of protection. It is true that the words "information, indictment, or action," occur in the earlier part of the section, but only by way of enumerating all the proceedings for offences under the Act. In *Reg.* v. *Buttle* (1) the Court put a beneficial construction on the word "perjury" in the section by holding that it referred only to perjury committed before the commissioners. The literal meaning of "indictment" should be departed from in like manner here, in order to carry out the intention of the legislature.

If the word "indictment" is to be construed literally, the answers of a witness given before the commissioners would not be admissible as evidence in the proceedings for perjury before justices which lead up to an indictment. There is no indictment till the bill is found by the grand jury, and there may never be one.

[DENMAN, J. The words of the section "in cases of indictments for perjury" may well include all proceedings leading up to the preferring of an indictment.]

That construction would strain the words of the section. If the inherent right of the Crown to inform in a misdemeanour is intended to be taken away an express enactment is surely required. It is not conceivable that the legislature would have carried out such an intention by the indirect process of enacting that the evidence necessary to convict should not be admissible. The Act applies to Scotland where two modes of criminal procedure prevail—"indictment" and criminal letters. There is no such proceeding as a bill found by a grand jury, and an "indictment" is a proceeding by the Lord Advocate, equivalent to an "information" in this country. So that if the literal meaning of "indictment" in the section is adhered to, the proviso would have a different and opposite operation in the two countries. Where language which has a different technical meaning in England and Scotland is found in a statute applying to both countries, the Court will, if possible, give effect to the more popular meaning, in order that the operation of the statute may be the same in

(1) Law Rep. 1 C. C. R. 248.

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both: *Lord Braybrooke* v. *Attorney General* (1), judgment of Lord Campbell.

Sir H. Giffard, Q.C. (*J. C. Lawrance, Q.C.*, and *Dugdale*, with him), supported the rule. There is no popular meaning of the word "indictment." In England, at any rate, it means but one thing to every one, i.e., a bill found in the ordinary way by a grand jury. Where it is intended to include an information, the legislature is careful to say so in express terms, as in 14 & 15 Vict. c. 100, s. 30. The statute which the Court have now to construe gives powers contrary to the usual course of common law to a peculiar tribunal. Sect. 7 specifies the various forms of procedure—"information, indictment, or action"—in which the Court may stay proceedings, and in the last proviso mentions "indictment" alone. If the words in the exception stood alone, without any distinction appearing in the earlier part of the section, the Court, in construing an exception in favour of the liberty of the subject, could look only to what the legislature has said. But à fortiori "indictment" should be construed according to its literal meaning, where in the earlier part of the section a distinction is clearly drawn between an indictment and an information. With respect to the application of the proviso to Scotland, it is admitted by counsel for the Crown that there is no proceeding by bill found by a grand jury in that country, and that practically the only mode by which the offender could be brought to punishment would be by an indictment according to Scotch law. It may well be, therefore, that the legislature had no reason to preserve any distinction between a proceeding by indictment and any other form of criminal procedure in Scotland.

DENMAN, J. I am of opinion that the rule must be made absolute. It was not until we had begun to form our judgments upon the other questions that the point now under discussion suggested itself to a member of the Court. I do not think it is advisable, looking at the course the case has taken, to express any opinion upon the questions discussed on the former occasion. They have now been brought so fully and clearly before the

(1) 9 H. L. 165.

attention of the law officers of the Crown, that if any ground exists for thinking an amendment of the law is required there is the fullest opportunity for considering what, if any, legislation is requisite. So far as the present case is concerned our decision upon the matter now before us renders the determination of the other questions immaterial both to the Crown and to the defendant.

The question argued before us to-day turns entirely upon the construction of a few words in the proviso at the end of s. 7 of 26 & 27 Vict. c. 29. I think the following words of the section which occur before the proviso are material, "and if any information, indictment, or action" be thereafter pending, &c.

These words point out three sorts of proceedings, indictment, information, and action. Two of them are criminal proceedings, and one civil, but all three are distinct. They are proceedings for offences under the statute, in which offences perjury is not included, so that "information" there probably refers to an information to recover penalties before justices. Next comes the proviso upon which the whole question turns. It occurred to my Brother Hawkins, and it is now relied upon by the defendant's counsel, that whilst the words of the section are as large as they can be to exclude, and render inadmissible as evidence in any proceeding, civil or criminal, an answer given before the Commissioners, the exception with respect to perjury is limited to the case of an "indictment" for perjury. It is contended on the other hand, for the Crown, that the word "indictment" in the proviso must be construed as meaning "criminal proceedings." I think there are fatal objections to that construction. The word has a well-known legal meaning. In this country at all events it is defined in text books, and well understood by lawyers as being wholly different from an information. There are two kinds of "information" applicable to perjury—one being a proceeding by the Queen's Bench Division on the relation of a person who thinks he is entitled to set the extraordinary power of the Court in motion—the other being the well-known proceeding by the Crown through the Attorney General. According to English law, and the understanding of English lawyers, an indictment is the proceeding correctly described in Chitty's Criminal Law (vol. i. p. 167),

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thus "An indictment is defined to be a written accusation of one or more persons of a crime presented upon oath by a jury of twelve or more men, termed a grand jury."

The Solicitor-General argued that a larger construction ought to be given because the statute applies to Scotland as well as England, and in Scotland, though there is a proceeding termed an "indictment," it differs from the English indictment, and more resembles the suit of the Attorney General upon information. I think that argument cannot be acceded to—at any rate to the extent the Solicitor-General desires. His contention would be stronger were there no such proceeding as an "indictment" in Scotland. The Court might then perhaps be inclined to stretch the ordinary meaning of the word in order to give the proviso some application in Scotland. But it always requires the strong compulsion of other words in an Act to induce the Court to alter the ordinary meaning of a well-known legal term. As there is such a proceeding as an "indictment" in Scotland, I think it is far more in accordance with the true construction of the proviso to say that it comtemplates that "indictment" with respect to Scotland, and the well-known English indictment with respect to England, than to say that it means neither the one nor the other, but something differing from either and including both. We should be distinctly legislating by importing words into the Statute were we to give the proviso the construction the Solicitor-General contends for. Inasmuch, therefore, as the proceeding was not by indictment in this case the exception from the general words of the proviso does not apply. It is admitted that in that case there was no evidence to support the prosecution. This being a criminal case it seems we cannot enter judgment for the defendant, but I think we are bound to order a new trial.

HAWKINS, J. A well-defined distinction exists and has long existed between an indictment and an information. An indictment is "an accusation found by an inquest of twelve or more upon their oath" (Burn's Justice, 30th ed. vol. 3, p. 2), whilst an information is a proceeding by the Attorney General of his own motion without the intervention of a grand jury.

Sect. 7 of 26 & 27 Vict. c. 29 provides that no person who is

called as a witness before the commissioners (who by s. 8 of 15 & 16 Vict. c. 57 have power to summon persons before them for the purpose of eliciting all the information which can be given with respect to corrupt practices at an election), shall be excused from answering any question relating to corrupt practices forming the subject of inquiry by the commissioners on the ground that the answer may criminate or tend to criminate himself. The common law privilege of a witness to refuse to answer on this ground is thus taken away, and the section goes on to provide in effect that where a person answers truly the questions put to him he shall be entitled to a certificate from the commissioners, which shall be a bar to any "information, indictment, or action" against him for any offence under the Corrupt Practices Prevention Acts, or in relation to the election with respect to which he shall be examined. Then comes the important proviso we have to construe. It is said that we are to construe "indictment" as though the words "criminal proceedings" had been used. If so why should the words at the end of the proviso, "in any proceeding civil or criminal," have been used? It is quite clear that in using them the legislature contemplated other criminal proceedings than an indictment. Having regard to the well-known mode of proceeding by indictment, and to the distinction drawn by the section itself, I come to the conclusion that indictment must be construed according to the recognised ordinary sense of the word, viz., as an accusation preferred by a jury of twelve or more. The very word itself excludes the other meaning suggested, viz., an information by the Attorney General of his own mere motion. In view of the fact that a person summoned before the commissioners is compelled to answer, I see no reason for extending the exception in the proviso in the way suggested. The Court can only look to the four corners of the Act, and where the legislature has in a former part of the same section used the words "information or indictment," shewing that the distinction between the two was borne in mind, and then in the latter part of the section has used "indictment" alone, it must be presumed that an indictment as distinguished from an information was there meant. That is to say, the legislature intended that answers given by a witness under pressure by the commissioners should

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not be used against him except in the particular case of an indictment presented by a grand jury for perjury. I am of opinion that the Court ought not, when a word having so well-known a meaning as the word indictment occurs in a statute, to stretch the ordinary well-known meaning in order to carry out the suggested intention of the legislature. It is wrong to speculate upon what their intention was; it is enough to say that, if they intended the exception in the proviso to apply to ex officio informations by the Attorney General, they have not carried out their intention.

BOWEN, J. I am of the same opinion. The distinction between an indictment and an information is one founded in the history of the law and liberties of this country. There are two great ways of proceeding against and bringing to trial a person accused of a crime; one is by proceeding against him before a grand jury, and time out of mind that proceeding has been known as an "indictment;" the other mode is by proceeding without a grand jury upon an information, which is initiated either by the law officers of the Crown or by a private prosecutor with the leave of the Court. The Solicitor-General has argued that the Court ought in construing the statute to limit the exception in s. 7, which is in favour of the liberty of the subject, by holding that the word "indictment" includes not merely an indictment but all criminal proceedings. The whole of the argument fails if it is not shewn that there is a popular use of the term "indictment" as including information. There is certainly no such popular use of the term among lawyers, and if there is among persons ignorant of the law it is an incorrect use of the term. There is nothing in the statute itself to give the proviso the operation contended for. On the contrary, three times in s. 7 is the term indictment used as distinguished from information. It is argued that if "indictment" be taken in the narrower sense, this anomaly would result, that in Scotland the exception would have an entirely different application. But it is conceded by the hypothesis that that must be so because criminal proceedings in Scotland are different from those in England, and it is therefore impossible to give the same interpretation to the word in both countries. If it could be shewn that "indictment" had no meaning in Scotland, and was

not a term applicable to any criminal proceedings, then the argument might be justified, but it fails whenever it is shewn that the word has a substantial meaning of its own in Scotland. There is, to my mind, nothing anomalous in giving the word its natural sense both in England and in Scotland. I am therefore of opinion that there has been a mis-trial, and under these circumstances there is no doubt that in cases of misdemeanour the Court has power to stay its hand and reverse the verdict of the jury. I think the rule for a new trial should be made absolute.

Rule absolute.

Solicitors for the Crown: *Hare & Fell; the Solicitors to the Treasury.*

Solicitors for defendant: *Collyer-Bristow, Withers, & Russell, for Millington & Simpson, Boston.*

W. A.

GALLAWAY, APPELLANT; MARIES, RESPONDENT.

Nov. 30.

Betting—"Place"—Station of Betting Man at a moveable Box within Ring at Races—16 & 17 Vict. c. 119, *s.* 3.

By 16 & 17 Vict. c. 119, s. 3, "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes" of betting with persons resorting thereto is liable to a penalty.

The respondent and a companion, having paid for admission, were in a railed inclosure of the grand stand at a race meeting. The companion stood on a small wooden box not attached to the ground, and he and the respondent called out offering to make and making bets with other persons. The companion received the money for bets made, and the respondent booked the same. They stood together in one place within the inclosure during the races:—

Held, that the fixed and ascertained spot defined in the inclosure by the box at which the respondent orally advertised his willingness to bet was a "place" used by him for the purpose of betting with persons resorting thereto, and he was liable to a penalty under 16 & 17 Vict. c. 119, s. 3.

CASE stated by justices of Sutton Coldfield under 20 & 21 Vict. c. 43.

Upon the hearing of an information preferred by the appellant against the respondent under 16 & 17 Vict. c. 119, s. 1, for that

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he, on the 1st of April, 1881, at Sutton Coldfield, then being a person using a certain place in Four Oaks Park there situate, did unlawfully use the said place for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to horse races, the justices dismissed the information.

The following facts were proved or admitted:—

On the 18th of April, 1881, a race meeting was held in Four Oaks Park, a private park belonging to the Four Oaks Park Company, admission thereto being by payment.

The respondent and John Schester paid for admission to the park and to the grand stand in the park, and during the races were in a railed inclosure attached to the stand, which inclosure was opened to persons admitted to the grand stand, and was commonly called and known as the Ring.

Whilst in the inclosure Schester stood upon a small wooden box, which was not in any way attached to the ground, and he and the respondent, who were in company and acting together, were calling out in the inclosure and were offering to make, and they made, ready money bets with other persons on some of the races. Schester received the money for the bets made, and the respondent booked the same; they stood together in one place within the inclosure during the races.

After objections taken and argued, the justices were of opinion that the inclosure was not a "place" within the meaning of the Act, and that the box did not constitute such place.

The justices submitted for the consideration of the Court whether the inclosure was a "place" within the meaning of the Act, and whether the box as used by the respondent did constitute such a place.

Bosanquet, for the appellant. By 16 & 17 Vict. c. 119, s. 1 no house, office, room, or other place shall be opened, kept, or used for the purpose of betting with persons resorting thereto, and by s. 3, any person who being the owner or occupier of any house, office, room, or other place, or a person using the same shall open, keep, or use the same for the purposes hereinbefore mentioned shall be liable to a penalty.

The respondent is liable. A stool and an umbrella over it have been held to be a "place" under the Act: *Bows* v. *Fenwick*. (1) "They formed an ascertained and fixed spot," said Lord Coleridge, C.J. Therefore such betting men as the respondent have given up the umbrella, but not the stool. They cannot, however, escape from the decision by abandoning the umbrella. It makes no difference.

[LOPES, J. It had a spike, and was fixed into the ground. Here there was only a moveable box put down.]

The spot was, however, fixed and ascertained. The word "fixed," as used in the cases, means merely "defined," and not fixed to the soil. Attachment to the ground is not necessary to form a "place" within the Act: *Shaw* v. *Morley*. (2) "It is no matter whether there is a roof or not, or whether the structure is moveable or fastened to the earth": per Kelly, C.B. This box, high enough to raise the man who stood on it above his fellows, sufficiently defined the place of resort when it was put to remain and mark the spot during the races. The object of the legislature was to stop a new and degenerate kind of betting: see *Haigh* v. *Corporation of Sheffield* (3), by preventing places of resort. A "place" is within the Act if used for the specific purpose at which the Act aims. "Defined position" and not "structure" is the test given by the cases.

[LOPES, J. Suppose a man with a remarkably high hat stood still for an hour on the same spot offering to bet, would that spot be a "place" within the Act?]

Perhaps not, because there would be no fact to suggest to the public that he would remain in the same spot.

[LOPES, J. Suppose a man put down a square yard of matting and stood on it offering to bet.]

Assuming that it was used so far exclusively as it could be, the matting might have the effect of the stool, except that as it would not raise the man above others it might not lead persons to resort there. But even a circle made on the turf might be within the Act.

The words "house, room, office," mean some building, and then

(1) Law Rep. 9 C. P. 339. (2) Law Rep. 3 Ex. 137.
(3) Law Rep. 10 Q. B. 102.

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the legislature, contemplating the possibility of betting elsewhere, add the words "other place," and the "place" is not ejusdem generis. Large open spaces, such as cricket grounds, used as places of resort for betting, are within the Act: *Haigh* v. *Town Council of Sheffield* (1): *Eastwood* v. *Miller*. (2)

The respondent did not appear.

GROVE, J. The decision of the magistrates cannot be upheld. Their question is not well framed, for they ask whether the inclosure was a "place" within the meaning of the Act, and whether the box as used by the men constituted such a "place." But the box, which is a moveable thing, cannot of itself be a "place," and perhaps the inclosure might not of itself be a "place" within the Act. The real question is whether the facts in the case constituted a "place" within the meaning of 16 & 17 Vict. c. 119, s. 3. The facts are that the respondent and his companion had a small wooden box, not attached to the ground, but defining a certain spot in a certain limited railed inclosure, and there, standing on and at the box, they advertised by their voices their willingness to bet, and took and made bets, and remained in the same spot during the races. Were they within the Act? I am of opinion that they were. Unfortunately we have not heard counsel on the other side, but the argument which, no doubt, would have been offered for the respondent must be that the words "other place" should be construed as ejusdem generis with "house, office, or room," and that a box, moveable, although not moved during the races, would not be in the nature of a "house, room, or office;" an argument might also have been founded on the form of the preamble of the Act, which seems directed against betting-rooms and offices. I should have had more doubt but for the decided cases. There are several which do not quite reach the present case, but three bear strongly on it. In *Bows* v. *Fenwick* (3) the appellant had a stool, which would probably be less indication of the place to persons resorting there than a box, because a box is a more unusual thing on a racecourse, and is perhaps rather less moveable. But above him he had a large umbrella on which "G. Bows,

(1) Law Rep. 10 Q. B. 102. (2) Law Rep. 9 Q. B. 440.
(3) Law Rep. 9 C. P. 339.

Victoria Club, Leeds," was painted in large letters. Therefore there was a temporary covering with words of advertisement over the man; a card was also exhibited, on which were the words, "We pay all bets first past the post." I do not think that the mode in which he advertised himself would make any difference. There he advertised himself by a painted umbrella and a card; but he also called out, offering to make bets. In this case the advertisement was wholly oral, but I do not think the mode of advertisement gives us much assistance in determining whether this was a "place." Then, putting aside for a moment the manner in which he advertised himself, or attracted the public, there was, besides the advertising, a spiked umbrella not easily upset. The Court, in their judgment, lay stress both on the fixity of the place and, if I may say so, on the fixity of the umbrella. Lord Coleridge, C.J., referring to *Doggett* v. *Catterms* (1), says that in that case "There was no ascertained place within the ambit of the park in which the appellant carried on his avocation. Without, therefore, quarrelling with the decision of the Exchequer Chamber, which does not at all interefere with our present judgment, we find, in *Shaw* v. *Morley* (2), a case exactly on all fours with the present;" and the Lord Chief Justice goes on to say, "There is a sufficient fixity of the structure by means of the spiked umbrella to bring the case within the words of the Act, as it is clearly within the mischief." His decision was based on two grounds, first, he says, "the thing described clearly was not a house or room. Was it an office or other place? Possibly it might be said to be in some sense an office: but I am of opinion that at all events it was a "place." It was an ascertained spot, where the appellant, for the time at least carried on the business of betting with all persons who might resort thither for that purpose." The spot here answers in every respect to that description. But then Lord Coleridge adds, "The card connected with the umbrella and the inscription upon it clearly indicated a fixed and ascertained place." I think the ground of the judgment was that the place was fixed, and the umbrella was only considered as indicating a place to the public around. The question is whether the Court would have come to the same

(1) 19 C. B. (N.S.) 765. (2) Law Rep. 3 Ex. 137.

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conclusion if the umbrella had been wanting, and the man had used some other means of attracting the public. I am inclined to think that the more important consideration is the fixity of the place, not indeed absolute fixity, as in the case of fixtures, but in the sense of the "place" being and remaining the same for a considerable time, long enough for the betting public to know where persons offering or willing to take bets might be found.

There is also another case, *Shaw* v. *Morley* (1), where there was a strip of ground in which there were small divisions, and in each of these was a desk moveable, but stationary when used. That was held to be an "office" and a "place" within the meaning of the Act, and Kelly, C.B., expressly said that it did not matter whether this structure had a roof or not. Therefore, coupling that judgment with the decision in *Bows* v. *Fenwick* (2), it would appear that the umbrella, being a mere advertisement, made no difference, but might be regarded only as indicating the fixed and ascertained place. *Doggett* v. *Catterms* (3), a case where the defendant offered bets under a tree in Hyde Park, was decided by the Court of Common Pleas in the same way. The decision was reversed in the Exchequer Chamber, but on grounds which do not lessen the force of the other two cases, and indeed rather affirm them, and the learned judges in the Exchequer Chamber, though differing somewhat in the reasons of their judgment, agreed in distinguishing that case from the others on grounds which tend to support my judgment that this was a "place" within the meaning of the Act. Pollock, C.B., said (4), "The opinions of the learned judges in the Court below proceed on the ground that the spot in which the defendant exercised his calling was a 'place' within the meaning of s. 1 of the statute. I concur in that view so far that I think the place being an open one, and not being a 'house,' 'office,' or 'room' would not alone prevent it from being a place within that section." So, according to the decision of the Lord Chief Baron, a mere spot, although not a "house, office, or room," was capable of being a "place" within the Act. But he thought it must be a place capable of having an

(1) Law Rep. 3 Ex. 137.
(2) Law Rep. 9 C. P. 339.
(3) 17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765.
(4) 19 C. B. (N.S.) 767.

owner or occupier, which that was not. There the defendant resorted to a spot by a tree. The crowd might push him away in moving about. There was no fixity of tenure even for the day-time. He had no more exclusive occupation of the spot than any one else in the park. Two other judges agreed for the reasons given by the Lord Chief Baron. Bramwell, B., said (1), "I agree that the judgment should be reversed, but not on the ground that a person to come within ss. 4 and 5 of the statute, must be an owner or occupier of the place, or a person acting on behalf of the owner or occupier. The object of the statute was to put down ascertained places of resort for gambling. I think the place in question was not a place of that sort within the contemplation of the Act."

So likewise in the present case there was, I think, an ascertained place of resort for gambling. And I think that it was, moreover, a "place" within the terms of the judgment of Pollock, C.B., "capable of having an owner or occupier," for it was within the ring enclosure, and was a place at least occupied and used permanently for the purpose of betting. In *Haigh* v. *Corporation of Sheffield* (2), the Court of Queen's Bench held the temporary owner of a cricket ground liable because he allowed persons to use the cricket ground for the purpose of betting, and that that was a "place," although the persons using it had chairs dotted over the ground which were capable of being moved about within the ambit of the cricket ground. Therefore I think all the cases shew that a "place" to be within the statute must be a fixed ascertained place, occupied or used so far permanently that people may know that there is a person who stands in a particular spot indicated by a certain definite mark with whom they may bet. I do not decide whether a person standing on a carriage step or in a circle where the turf was cut away, or where a little heap of stones was put down during the races, would be within the Act if he offered to bet there. But I am far from saying that he would not be so. Here, however, there was, in my opinion, a place within the meaning of the Act.

In ascertaining whether general words following special words are ejusdem generis, each case must be looked at by itself. In

(1) 19 C. B. (N.S.) 767. (2) Law Rep. 10 Q. B. 102.

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some cases the words "other place" may receive a narrow construction, as where the object of the Act or decision shews that the area of legislation in the one case, or the ground of the decision in the other, may from the nature of the case be very limited. In other cases the words ejusdem generis may be wider. The object of this Act was to prevent gambling, and also to prevent persons having fixed localities to which other persons intending to gamble may "resort" for the purpose. Construing statutes we must always ascertain the object sought to be remedied, and ask if the case in question comes reasonably within the words of the statute, having regard to what it is intended to correct. I think the decision of the justices was wrong.

LOPES, J. The Act is for the suppression of betting-houses. Sect. 3 imposes a penalty on any person who being the owner or occupier of any "house, office, room, or other place," shall open, keep, or use the same for the purpose of betting. Although I have had some hesitation throughout this argument, I have never doubted that the facts of this case come within the mischief sought to be corrected by the Act, and unless the respondent were convicted, it would be very successfully evaded. But does the case come within the terms of s. 3? My first difficulty arose from thinking that the words "other place," following as they do "house, office, room," must be read "other place" "having the nature of a house, office, or room." That difficulty was removed by the authorities cited, for I find that it has been decided that those words "other place," can, and may include, not only a cricket ground, but also a place for pigeon shooting: *Eastwood* v. *Miller*. (1) My second difficulty was in saying that a wooden box like that in question could be a "place" within the meaning of this Act, and if the matter were res integra, and untouched by decisions, I should continue to feel the same difficulty. But *Bows* v. *Fenwick* (2) seems decisive on the point as to the box, and certainly is the strongest of the cases, and has gone farther than the others. There are expressions used by the Lord Chief Justice, and also by Brett, L.J., and Denman, J., which go further

(1) Law Rep. 9 Q. B. 440. (2) Law Rep. 9 C. P. 339.

still, and the effect of their judgments seems to be that any piece of ground appropriated by a person offering to make bets may be a "place" within the meaning of the Statute. I feel sure that this case is within the principle of *Bows* v. *Fenwick* (1), and I agree that the decision of the justices should be reversed.

Decision reversed and case remitted to justices.

Solicitors for appellant: *Needham.*

J. R.

LAWS, APPELLANT; ELTRINGHAM, RESPONDENT.

Dec. 6.

Criminal Law—Malicious Injuries to Property Act (24 & 25 *Vict. c.* 97, *s.* 52)—*"Real or Personal Property"—Incorporeal hereditament—Herbage Right.*

The soil of a town moor was vested in the corporation of the town in fee, but freemen and widows of deceased freemen of the town were under statute entitled to the "full right and benefit to the herbage" of the town moor for two milch cows:—

Held, that this right to the herbage was not "any real or personal property whatsoever" within the meaning of the Malicious Injuries to Property Act (24 & 25 Vict. c. 97), s. 52, which applies only to tangible property and not to a mere incorporeal right.

CASE stated by justices of the borough of Newcastle-upon-Tyne under 20 & 21 Vict. c. 43.

At a petty sessions in the borough an information by the appellant Laws, superintendent of the town moor, on behalf of Samuel Rowell and others, against the respondent, under 24 & 25 Vict. c. 97, s. 52, charging that the respondent unlawfully did wilfully commit damage, injury, and spoil to and upon certain grass and herbage then growing on the town moor, the property of Samuel Rowell and others, the stewards and wardens of the freemen and widows of freemen of the borough for all purposes relating to the town moor, thereby then and there doing injury to the said property to an amount not exceeding 5*l.*, contrary to the statute, was heard, determined, and dismissed by the justices, who on the application of the appellant stated this case:

(1) Law Rep. 9 C. P. 339.

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On the hearing, the following facts were proved or admitted.

The respondent had committed damage, as alleged in the information by bowling, in company with others, at a game of bowls on the grass and herbage growing on the town moor, to the amount of one penny.

The respondent was not a freeman, nor an inhabitant of the borough, but resident six miles from it.

The town moor is within the borough, and consists of about 1200 acres of grazing and agricultural land. The corporation of Newcastle are entitled to the soil of it for an estate in fee simple, and the same is subject to a right of herbage or pasturage for two milch cows respectively in the resident freemen or free burgesses and the resident widows of deceased freeman or free burgesses of the borough.

The public have free access to the town moor or town lands in question and an unrestricted right of walking and riding on and over every part of the same, except over certain parts which under an Act relating thereto are from time to time enclosed for the purposes of cultivation. This free access to the town moor or lands has been used and exercised by the public.

By 14 Geo. 3, c. ccxiv. (the Town Moor Act, 1774), s. 1, an Act for confirming to the freemen and widows aforesaid their full right and benefit to the herbage of the town moor, it is enacted, "that the full right and benefit to the herbage" of . . . . the town moor for two milch cows respectively is confirmed to the freemen and widows for ever, but that such right shall be subject to such demise, restriction, and regulations for the culture and improvement of the town moor as in the Act is mentioned.

By s. 16, nothing in this Act contained shall extend "to take away, annul, or alter any of the rights which the corporation of Newcastle-upon-Tyne, as owners of the soil of the said town moor, . . . are intituled unto, or to give them any new or other rights than they are now intituled to."

By 33 & 34 Vict. c. cxx., the Newcastle-upon-Tyne Improvement Act, 1870, after reciting that the corporation are entitled to the soil of the town moor for an estate in fee simple, and the same is subject to "a right or benefit of herbage in the freemen and widows aforesaid (which right or benefit is in this Act

referred to as the herbage right)," sect. 6 enacts, that there shall be for the purposes of this Act a committee of the stewards and wardens chosen as therein described, "which committee shall be by virtue of this Act authorized and required to act for and on behalf of the stewards and wardens, and freemen and widows of freemen for all purposes relating to the town moor."

The appellant was the superintendent, and Samuel Rowell and others were the committee of stewards and wardens for the current year.

It was contended, inter alia, that the grass was part of the freehold, and as such the property of the corporation who were entitled to the soil as recited in s. 6; that all the freemen had was the right or benefit of the herbage; and that there was therefore neither real nor personal property belonging to the freemen which had been damaged.

The justices decided that the ownership of the soil, and therefore the property in the herbage, was in the corporation, and the freemen's right was somewhat analogous to the rights of common in gross, which were merely incorporeal rights, and the appropriate remedies for which were by action on the case, or by abatement. The justices accordingly gave their determination against the appellant.

The questions were,—1st. Whether "the herbage right" in question was or was not real or personal property within the meaning of the 52nd section of the Malicious Injuries to Property Act?

2ndly. If it were, whether the ownership of such property was properly laid in the persons mentioned in the information.

Sir F. Herschell, S.G. (with him *Joel*), for the appellant. First. By 24 & 25 Vict. c. 97, s. 52, "whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real and personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided," shall, on conviction, be imprisoned or fined and pay compensation. This herbage is real property. It is certainly "property." Damage was done to it, and the offender should have been convicted under s. 52.

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Secondly. The information was rightly laid by and on behalf of the superintendent of the town moor, and the stewards and wardens of the freemen and widows. The corporation of Newcastle have no power of dealing with the surface except in conjunction with them. Even if the soil is vested in the corporation, they have but a bare freehold, and are not interested in the surface, and those who are interested in it may take proceedings: *Tarry* v. *Newman*. (1)

A. Wills, Q.C., and *Vesey Fitzgerald*, for the respondent. The question advisedly put by the justices is—not whether the herbage of the town moor, but—whether this "herbage right" of the freemen and widows is real property within the Malicious Injuries Property Act, s. 52. It is not. The grass is the property of the corporation—who are owners of the soil. The "herbage right" is a mere licence to certain classes of persons to take herbage by their cows. It is an incorporeal right over a large tract of ground. The right has not been injured. The statute applies only to corporeal property, tangible, and visible, such as buildings, cattle, and the various other kinds of tangible and visible property mentioned in the Act, and to which the words "real and personal property" in s. 52 must be limited. It could not have been intended to introduce into the criminal law such an offence as that of maliciously injuring a mere right as of light or ways. Lights are often spitefully blocked without justification, yet it never has yet been supposed that, by so obstructing them, an offence within the Malicious Injuries Act is committed.

Secondly. The corporation being owners of the soil, and consequently of the herbage—subject to the eatage right—would be proper informants if the grass were injured.

Joel, in reply. The words "any real and personal property whatsoever" are most comprehensive. Every kind of property must be either real or personal. It is contended that the right of the freemen is a mere abstraction—eatage—but it is declared in the local Acts to be "herbage." The true question is, Was the grass which the freemen are entitled to take, and which was damaged, real property? The Court will, moreover, hear and determine questions of law arising on the facts stated by justices under

(1) 15 M. & W. 645; 15 L. J. (M.C.) 160.

20 & 21 Vict. c. 43, s. 6, although they were not taken before the justices, or expressly reserved for the consideration of the Court: *Knight* v. *Halliwell.* (1)

GROVE, J. This case is not one in which we should answer more questions than are in terms asked us. We are asked, whether "the herbage right" in question is or is not real or personal property, within the meaning of the 52nd section of the Malicious Injuries to Property Act? I am clearly of opinion that it is not. "Real and personal property," within the meaning of s. 52 seems to me to be something real and tangible, not a mere legal right. I have glanced at every section in the Act, and find that each provides against damage actually done or attempts to do damage to something tangible, such as buildings, machinery, crops, trees, coal mines, railways, telegraphs, turnpikes, &c., and not against injury to a right. Such injury may be actionable, but is not within this statute. The question is not as to the herbage, but as to the "herbage right." It is unnecessary to answer the question whether the information was laid by the proper persons, but I should say that the proper persons to lay it were the corporation, because they are entitled to the soil of the town moor for an estate in fee simple, and that is subject to the herbage right.

LOPES, J. I confine my decision to the first question which is asked of us. Answering that in the negative, it is unnecessary to answer the second question. It was contended that the words "right or benefit of herbage" do not correctly represent the true interest of the freemen and widows in this town moor; but I think the words do rightly describe the interest, and I have a difficulty in finding terms more apt than those in which it is described. The Act of 1870 recites that the corporation are entitled to the soil of the town moor for an estate in fee simple, and the same is subject to the right or benefit of herbage in the freemen and widows aforesaid. Then is this right of herbage "real or personal property" within the Malicious Injuries to Property Act? There are two kinds of real property—corporeal

(1) Law Rep. 9 Q. B. 417.

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and incorporeal—real property which is tangible and visible, such as land, and real property which is not tangible and visible, such as advowsons, rights of way, rights of common, and a number of others. I am clearly of opinion that s. 52 of the Malicious Injuries to Property Act in using the words "real property" means only to refer to what is corporeal, tangible, and visible, and not to that which is incorporeal, intangible, and invisible. If the other sections of the Act be examined it will be found there is nothing in them which does not refer to corporeal, tangible, or visible property. I think the justices were right in dismissing the case.

Judgment for the respondent.

Solicitors for appellant: *Pyke & Parrott.*
Solicitors for respondent: *Fallows & Brown.*

J. R.

Dec. 19.

THE LONDON AND COUNTY BANKING COMPANY *v.* GROOME.

Cheque—Presentment—Laches of Bearer.

The rule of law as to bills of exchange and promissory notes—that an indorsee taking them after maturity takes them upon the credit of and can stand in no better position than his indorser—does not apply to cheques.

A cheque for 98*l.*, dated the 21st of August, 1880, directing the National Bank to pay that sum to A. M. or bearer, was handed by the defendant (the drawer) to one C. under circumstances which, if C. had been suing upon it, would have been an answer to his claim. In fraud of the defendant, C. on the 29th paid it into his account with the London and County Banking Company, who, upon the presentment and dishonor of the cheque on the same or the following day, sued the drawer for the amount. There was no evidence of the absence of bona fides on the part of the plaintiffs, or that they had notice of the alleged fraud of C.:—

Held, by Field, J., on further consideration, that the plaintiffs were entitled to recover.

Down v. *Halling* (4 B. & C. 330), and *Rothschild* v. *Corney* (9 B. & C. 388), considered and distinguished.

ACTION by the bearers against the drawer of a cheque.

Statement of claim. That the defendant on the 21st of August, 1880, by his cheque directed to the National Bank, Notting Hill branch, required the said bank to pay to one A. Moss or bearer the sum of 98*l.*; that the plaintiffs became the bearers of the

said cheque, and the same was duly presented for payment, and was dishonored; and that the defendant had due notice of such dishonor, but had not paid the amount of the cheque, or any part thereof.

Statement of defence. Paragraphs 1, 2, and 3, admitted the drawing of the cheque, but denied notice of dishonor.

4. On or about the 20th of August, 1880, the defendant handed the cheque to one George Colls, who gave the defendant no consideration for the same, upon a distinct agreement and understanding that the cheque was to be held as security for a bill of exchange which Colls had requested the defendant to procure discount of for him, Colls. Colls further promised and undertook that he would not part with nor in any way deal with the cheque until the defendant procured discount of the said bill of exchange. The defendant was unable to procure discount of the said bill of exchange, and gave notice thereof to Colls before he paid the cheque to the plaintiffs.

5. In breach of the said agreement and in fraud of the defendant, Colls paid the cheque to the plaintiffs, who had notice of the premises.

6. The plaintiffs were the agents of Colls for the purpose only of collecting the proceeds of the cheque, and, if the same was paid, of placing the proceeds to his credit. The plaintiffs have given no consideration for the cheque, and hold the same subject to the agreement before referred to and to the equities existing between Colls and the defendant.

7. The cheque was presented for payment by Colls, and dishonored by the defendant's bank, and the plaintiffs subsequently, at the expiration of eight days, took the same with notice thereof, and subject to the agreement between Colls and the defendant, and the equities existing between Colls and the defendant.

Reply joining issue and alleging facts excusing notice of dishonor.

The cause was tried before Field, J., at the last Michaelmas sittings for Middlesex. The facts and the course which the trial took sufficiently appear in the judgment.

The case was argued upon further consideration on the 26th of November, 1881, by *H. Matthews, Q.C.* (*Paget,* with him), for the

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plaintiffs, and by *Rose-Innes* (*Talfourd Salter, Q.C.*, with him), for the defendant.

The following authorities were cited:—*Brown* v. *Davies* (1); *Boehm* v. *Sterling* (2); *Robinson* v. *Hawksford* (3); *Rickford* v. *Ridge* (4); *Serle* v. *Norton* (5) *Down* v. *Halling* (6); *Rothschild* v. *Corney* (7); *Goodman* v. *Harvey* (8); *Bank of Bengal* v. *Fagan* (9); *Brooks* v. *Mitchell* (10); *Serrell* v. *Derbyshire Ry. Co.* (11); *Ingham* v. *Primrose* (12); Story on Promissory Notes, §§ 491–498; Byles on Bills, 13th ed. 171; Chitty on Bills, 11th ed. 161, 163, 188, 360.

Cur. adv. vult.

Dec. 19. FIELD, J. This is an action brought to recover 98*l.*, the amount of a cheque of which the plaintiffs were the bearers. It was dated the 21st of August, 1880, and it directed the National Bank to pay that sum to A. Moss or bearer; and the statement of claim alleged presentment for payment, non-payment, and due notice of dishonor.

The defendant by his statement of defence denied notice of dishonor, and alleged that the defendant on the 20th of August, 1880, handed the cheque to George Colls under such circumstances as, if proved and if the latter had been the plaintiff, might have presented a good answer to the claim: and the statement of defence then alleged (par. 5) that Colls in fraud delivered the cheque to the plaintiffs, who had notice of the premises.

As a separate defence, the defendant further alleged (par. 6) the same circumstances, and that the plaintiffs were the agents of Colls, and had given no consideration, and held the same subject to the equities existing between Colls and the defendant. As a further defence, the defendant said that the cheque was presented for payment by Colls and dishonored, and the plaintiffs at the expiration of eight days took the same with notice, and subject to the equities.

(1) 3 T. R. 80.
(2) 7 T. R. 423.
(3) 9 Q. B. 52.
(4) 2 Camp. 537.
(5) 2 M. & Rob. 401, 404, n.
(6) 4 B. & C. 330.
(7) 9 B. & C. 388.
(8) 4 Ad. & E. 870.
(9) 7 Moo. P. C. (N.S.) 61, 72, 76.
(10) 9 M. & W. 15.
(11) 9 C. B. 811.
(12) 7 C. B. (N.S.) 82, 85.

At the trial the plaintiffs proved that Colls was a customer having an account at one of their branches, and that he had on the 29th of August (eight days after the date) paid in the cheque to the credit of his account, and that they had given him consideration for the same.

The defendant cross-examined the plaintiffs' witnesses, but did not elicit from them any circumstance tending to shew any notice, or absence of bona fides on the plaintiffs' part, or that the payment of the cheque by Colls into his account was made under any circumstances which ought to have excited the suspicion of the plaintiffs as reasonable men of business, except the circumstance that the delivery to them was made eight days after the date of the cheque.

The plaintiffs' counsel having contented himself with proving a primâ facie case, at the close of it Mr. Talfourd Salter said that he had no affirmative evidence to prove any notice to the plaintiffs, and did not wish to address the jury upon the question as to the consideration given by the plaintiffs or the presentment by Colls alleged in the fifth paragraph or the notice of dishonor; but he submitted that, as the statement of defence alleged that the plaintiffs took the cheque eight days after its date, I was bound to rule that this circumstance alone was sufficient to entitle him to the benefit of the well-established rule of law, as applicable to overdue bills of exchange and promissory notes, that those who take them take them at their peril, and stand in no better position than those from whom they take them as to any equities between the latter and the acceptor or maker attaching to the instrument: and for authority upon this point he cited the case of *Down* v. *Halling*. (1) Mr. Matthews, for the plaintiffs, denied the existence of any such rule of law, and relied upon the subsequent case of *Rothschild* v. *Corney*. (2)

I for the purpose of the day ruled against Mr. Talfourd Salter's contention, and directed a verdict for the plaintiffs; reserving however for further consideration the question whether the mere circumstance that the plaintiffs took the cheque eight days after its date was enough by itself, as a matter of law, to place the plaintiffs in the position of taking at their peril, so as to entitle

(1) 4 B. & C. 330. (2) 9 B. & C. 388.

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the defendant to treat them as if they were in the position of Colls, and liable to have their title to sue defeated by any matter attaching to the cheque which would have amounted to an answer against Colls.

The case was afterwards argued before me on further consideration, when all the authorities on both sides were ably and fully brought before me; and, having considered them, I see no reason to alter the view which I took at the trial.

That the holder of an overdue bill or note payable at a fixed date (appearing of course upon it) is in the position suggested, is established beyond all doubt; and the reason of the rule is, that, inasmuch as these instruments are usually current only during the period before they become payable, and their negotiation after that period is out of the usual and ordinary course of dealing, that circumstance is sufficient of itself to excite so much suspicion that, as a rule of law, the indorsee must take it on the credit of and can stand in no better position than the indorser: *Brown* v. *Davies*. (1) But, with regard to cheques, no such rule has been laid down (the case of *Down* v. *Halling* (2), as I shall shew presently, not amounting, I think, to any such decision); and there is more than one case in which that proposition has been denied or doubted.

In *Rothschild* v. *Corney* (3) the action was brought by the maker of the cheque to recover the amount from the defendant, who had obtained cash for it. The cheque was dated the 19th of January: it had been obtained from the plaintiff by the fraud of Brady, and Brady on the 24th (five days after date) handed it to the defendant, who cashed it bonâ fide, and afterwards presented it and received the amount from the plaintiff's bankers. At the trial the learned judge directed the jury, that, if they thought the circumstances of the case were such as ought to have excited the suspicions of prudent men, and that the defendant had not acted with reasonable caution, they should find a verdict for the plaintiff; otherwise, for the defendant. A rule was thereupon obtained for a new trial, on the ground that the judge ought to have directed the jury that the cheque was overdue and so had

(1) 3 T. R. 80. (2) 4 B. & C. 330.
(3) 9 B. & C. 388.

affected the defendant with the plaintiff's equities against Brady; but, after argument, in which *Down* v. *Halling* (1) was cited, the rule was discharged; Lord Tenterden saying that it could not be laid down as a matter of law that a party taking a cheque after any fixed time from its date does so at his peril, and Littledale, J., observing that, although the rule of law was so as to bills and promissory notes, it could not be applied to cheques.

In *Serrell* v. *Derbyshire Ry. Co.* (2) the chueqe was dated the 13th of August, 1847, and was not presented until the 6th of October; and the case of *Down* v. *Halling* (1) was cited by Cresswell, J., for the proposition of Holroyd, J., viz. that the defendants, having taken the cheque more than five days, took it at their peril; and Byles, Serjt., saying that *Down* v. *Halling* (1) was not consistent with *Rothschild* v. *Corney* (3), Maule, J., said, "There is no such strict law as to cheques, that they *must*, as against the maker, under such circumstances be presented promptly; but that, where a reasonable time has passed, they stand on the same footing as bills of exchange;" and he thought that the cheque in that particular case might practically be considered in the nature of an overdue bill, and, fraud being shewn in its inception, the onus was thrown upon the plaintiff of shewing how he got it.

Of course, even with regard to cheques, there is no doubt that in the ordinary course of business they are intended almost as cash, and for early if not prompt payment; and it is well known law that, as between the maker and payee, although there is no absolute duty to present a cheque promptly, that duty exists to such an extent that exact rules have been laid down beyond which the payee may not delay presentment, if he wish to avoid the consequence of any damage caused to the maker by the insolvency of the drawee, or otherwise; and, having regard to this duty, I have come to the conclusion that, looking to the peculiar circumstances of *Down* v. *Halling* (1), and the manner in which the matter was there treated, there is no such conflict between that case and the case of *Rothschild* v. *Corney* (3) as has been supposed. In *Down* v. *Halling* (1), the plaintiff sought

(1) 4 B. & C. 330. (2) 9 C. B. 811.
(3) 9 B. & C. 388.

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to recover the amount of a cheque for 50*l.*, dated the 16th of November, 1824. He did not shew how the cheque got out of his hands; but it appeared that, on the evening of the 22nd, a woman unknown to the defendant bought at his shop goods worth 6*l.* 10*s.*, and tendered the cheque in payment, he paying her the difference. He presented the cheque on the following day, and received the amount. No evidence having been given by the plaintiff accounting for its having got out of his hands, the defendant claimed a nonsuit on that ground; but Lord Tenterden told the jury to find for the plaintiff, if they thought that the defendant had taken the cheque under circumstances which ought to have excited the suspicion of a prudent man; and, further (on the authority of *Gill* v. *Cubitt* (1), which has since been overruled), asked whether the defendant, although not acting fraudulently, had acted negligently in taking the cheque; and upon that direction the jury found a verdict for the plaintiff. Upon a rule having been obtained to set aside the verdict on the ground of misdirection, the Court supported the direction as to negligence, upon the authority of *Gill* v. *Cubitt* (1); and as to the rest Bayley, J., is reported to have said that, "if a cheque is taken after due, the party taking it can have no better title than the person from whom he took it;" and it is in this passage that he is supposed to lay that proposition down as a rule of law.

It must be recollected, however, that Lord Tenterden was also a party to the decision in *Rothschild* v. *Corney* (2), and could not have intended to hold in that case, contrary to the recent decision in *Down* v. *Halling* (3); and if the language of Holroyd, J., is looked at, where he says that five days ought to have excited the defendant's suspicion, and that in the case before him a reasonable time had elapsed, I think the true result of *Down* v. *Halling* (3) is, that the Court decided the case rather upon the peculiar facts of that case than as intending to lay down any strict rule of law. In *Serrell* v. *Derbyshire Ry. Co.* (4), Maule, J., says that perhaps the two cases may be reconciled; and upon my view of the true ground of the decision in *Down* v. *Halling* (3), I have been able to come to the same conclusion.

(1) 3 B. & C. 466.
(2) 9 B. & C. 388.
(3) 4 B. & C. 330.
(4) 9 C. B. 388.

I should, therefore, under ordinary circumstances, have contented myself with giving judgment for the plaintiffs; but I think that, assuming this to be the true view of *Down* v. *Halling* (1), it follows from that as well from the other cases that, the real question for the jury being whether the cheque in the present case was taken by the plaintiffs under such circumstances as ought to have excited their suspicion, and the lapse of eight days being, although not conclusive, a circumstance to be taken into consideration by them in coming to a conclusion on that question, I ought to have left it to the jury. I should, indeed, have done so if I had understood that Mr. Talfourd Salter had wished it; but from what passed on the argument, I think there may have been some misunderstanding on my part in the matter. Undoubtedly, however, that question has not been put to the jury, and the defendant is entitled to have it put if he so wishes. I therefore give judgment for the plaintiffs with costs, subject to the condition that, if the defendant elect within ten days after notice of my judgment to have a new trial, he may do so, and in that event the costs of the former trial and of the further consideration should abide the event of the second trial.

Rule accordingly. (2)

Solicitors for plaintiffs: *White, Broughton, & White.*
Solicitor for defendant: *J. A. Hales.*

(1) 4 B. & C. 330.

(2) The defendant not electing to take a new trial within the time specified, the plaintiff signed judgment.

J. S.

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Limitations, Statute of—Reply of concealed Fraud and Absence of reasonable Means of Discovery.

In an action to recover damages for fraudulent representations, a reply to a defence of the Statute of Limitations, that the plaintiffs did not discover and had not reasonable means of discovering the fraud within six years before action, is good.

affirmed on Appeal 9 QBD 59 CA

STATEMENT OF CLAIM. 1. The defendant is a chartered accountant, financial agent, and promoter of public companies.

2. In the year 1870, a company called The Phospho-Guano Company, Limited, was established and registered. The defendant was a promoter of the company, and he was afterwards appointed auditor of its accounts, and he was so at the time of the issue of the balance-sheet hereinafter-mentioned.

3. The defendant issued and published and sanctioned and authorized the issuing and publication of a letter dated the 13th of March, 1872, addressed by Peter Lawson & Son to one W. Westgarth by and with the authority and concurrence of the defendant, and a memorandum attached thereto, and a prospectus and reports of the second and third general meetings of the shareholders of the company, and the balance-sheets thereto annexed.

4. The letter, memorandum, prospectus, and balance-sheet contained, amongst other representations and statements, the following representations and statements,—(setting them out).

5. The plaintiff has since discovered (as the fact is) that the whole of the said representations and statements and others contained in the said letter and memorandum, prospectus, reports, and balance-sheets, were false and untrue and fraudulent, and the defendant always knew them to be false, and made the same without believing or having good cause to believe them or any of them to be true.

6. The defendant issued and published and sanctioned and authorised the issuing and publication of the said letter, memorandum, prospectus, reports, and balance-sheets falsely and fraudulently, and with intent to defraud, deceive, and injure the plaintiff, and to induce him to purchase shares in the company.

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7. The defendant with a like intent caused a copy of the letter and memorandum and of the prospectus, reports, and balance-sheets, to be delivered to the plaintiff, and thereby and through his agent, one Westgarth, and otherwise, falsely and fraudulently represented to the plaintiff that the statements and representations contained in the letter, memorandum, prospectus, reports, and balance-sheets, were true, and that the same contained a full, complete, and accurate statement of the formation and position of the company, and of all the facts material to be known by intending purchasers of shares therein, and that the company was a bonâ fide, sound, and prosperous concern.

8. The defendant always knew, as the fact was, that the said statements and representations were false, and also that the letter, memorandum, prospectus, reports, and balance-sheets were not true and did not contain a full and complete or accurate statement of the formation and position of the company and of all the facts material to be known by intending purchasers of shares therein, and that the same was not a bona fide, sound, and prosperous concern. In particular, in addition to the untrue statements and representations set forth in par. 4 hereof, the defendant well knew and fraudulently concealed from the plaintiff that Peter Lawson & Son were at the time of the formation of the company hopelessly insolvent, that the company was formed for the purpose of paying off a debt due by them to the British Linen Company, for whom the defendant acted as agent, and that the capital of the company was fixed at a very excessive and unjustifiable amount; that the profit shewn by the company's books and the said documents was apparent only and was made to appear by treating shipments of guano to France and Denmark on consignment and under advances as sales producing much higher prices than were realised, and omitting to deduct interest, expenses, and charges therefrom, and also by entering quantities of stock as sold which in fact was not sold at all, and by overstating the stock account and the outstanding debts, and including amongst the latter the price of guano consigned or ordered as if it were actually sold, and producing bills for part of such prices which were obtained for this purpose under an undertaking to return them after it had been effected, and manipulating the

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bank account, and making no provision for bad debts, and by other similar manipulations.

9. By means of the said misrepresentations and statements and concealments, and the said letter and memorandum, prospectus, reports, and balance-sheets, and acting on the faith thereof, and in the belief that the same were true, the plaintiff was induced to believe that the company was a bonâ fide, sound, and prosperous concern, and to purchase, and he did purchase, 250 "B." shares in the company at par, for which he paid 2500*l.*

10. The said shares always were and now are worthless, and consequently the plaintiff has lost the price he paid for the shares and the use of, and interest on, 2500*l.*

The plaintiff claimed,—1. 3500*l.*,—2. such further and other relief (if any) as the nature of the case may require.

Statement of Defence. 11. The plaintiff's causes of action, if any such there be, did not nor did any of them nor any part thereof accrue within six years before the commencement of this action.

Reply. 1. The plaintiff joins issue on the defendant's statement of defence.

2. With reference to the 11th paragraph of the statement of defence, the plaintiff, in addition to joining issue thereon, says,—

(*a*). That the cause of action relied on is, the fraud and fraudulent misrepresentation of the defendant:

(*b*). That the plaintiff did not discover the existence of the fraud until within six years next before the commencement of this action:

(*c*). That the plaintiff did not discover that the defendant had been a party to or was guilty of the said fraud until within six years next before the commencement of this action:

(*d*). That the plaintiff could not by the exercise of reasonable diligence have discovered, and had not the means of discovering, the matters in sub-paragraphs (*b*) and (*c*) hereof, until within six years next before the commencement of this action:

(*e*). That the existence of and the means of discovering such fraud were concealed by the defendant until within such six years:

(*f*). That the defendant, in order to prevent the plaintiff from discovering the said fraud and that he had been guilty of it,

actively and deliberately concealed the same until within six years next before the commencement of this action, and so prevented and delayed the plaintiff from discovering the same and bringing this action in respect thereof.

The plaintiff relies on the statements made in all these sub-paragraphs collectively, and also on any one or more of them separately, as an answer to the 11th paragraph of the statement of defence.

Rejoinder, demurrer, and special rejoinder. 1. The defendant joins issue on the whole of the 2nd paragraph of the plaintiff's reply.

2 The defendant also demurs to the sub-paragraphs (*a*), (*b*), (*c*), (*d*), (*e*), and (*f*) of the said second paragraph, on the ground that none of the matters in the said sub-paragraphs or in any of them alleged afford the plaintiff any extension of the time allowed for commencing this action by the various statutes of limitation, or prevent the operation of those statutes.

3. The defendant further says that the said alleged causes of action, fraud, fraudulent misrepresentation, and concealment in the 2nd paragraph of the reply mentioned, if any such there be (which the defendant denies), did not nor did any or either of them accrue or take place within six years next before the commencement of this action. Joinder.

The demurrers were argued before Field, J., on the 25th of November, 1881, by *Meadows White, Q.C.* (*T. Willes Chitty* with him), for the plaintiff, and *W. G. Harrison, Q.C.* (*Ram* with him), for the defendant. The arguments and the authorities cited are fully set out in the judgment. (1)

Cur. adv. vult.

FIELD, J. This case raises an important question as to the operation of the Statute of Limitations, in bar of an action in which the plaintiff claims damages for fraudulent representations made by the defendant more than six years before the commencement of the action; and also claims to exclude the application of

(1) The dictum of Fry, J., in *Trotter* v. *Maclean*, 13 Ch. D. at p. 584, was also cited.

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the statute, by reason of the non-discovery by the plaintiff of the fraud within the period of limitation, such non-discovery having been induced, as he alleges, by the active concealment of the fraud by the defendant from the plaintiff, who could not by exercise of reasonable diligence have discovered it.

The statement of claim sets out the alleged fraudulent representations, and alleges that by reason of them the plaintiff was induced to purchase shares which were always worthless, and so the plaintiff lost the price, 2500*l.*; and to this statement of claim (in addition to denials of the representations complained of) the defendant alleges that the cause of action did not arise within six years next before the commencement of the action.

The plaintiff in his replication, after taking issue upon the statement of defence, sets out the following averments,—(*b*), that the plaintiff did not discover the existence of the said fraud; (*c*), or that the defendant had been a party to or was guilty of it; (*d*), and the plaintiff could not by the exercise of reasonable diligence have discovered, and had not the means of discovering the matters in sub-paragraphs (*b*) and (*c*) until within six years next before the commencement of the action; (*e*), that the existence of and the means of discovering such fraud were concealed by the defendant until within such six years; (*f*), that the defendant, in order to prevent the plaintiff from discovering the fraud, and that he had been guilty of it, actively and deliberately concealed the same until within six years next before the commencement of this action, and so prevented and delayed the plaintiff from discovering the same and bringing this action in respect thereof.

To these averments the defendant demurred, and also alleged that the several frauds and concealments alleged in the statement of defence did not accrue within six years before the commencement of the action: and to this averment the plaintiff demurred on the ground that, even if true, it was immaterial if the fact was as alleged that the defendant's acts prevented the discovery, at whatever period they took place.

These demurrers came on for argument before me.

It was contended for the plaintiff, that, in a case of fraud such as the present, the period limited by the Statute of James the 1st

never did, either in law or in equity, before the coming into operation of the Judicature Acts, and does not now, commence to run until the period when the plaintiff could by the exercise of reasonable diligence have discovered the fraud and that the defendant was a party to it.

The defendant's counsel, on the other hand, whilst admitting that before the Judicature Acts there had been cases solely cognizable by courts of equity, in which a party coming into a court of conscience was not permitted to avail himself of a bar to which he was not in conscience or de jure entitled (suits in equity not being included in the Statute of James), which his own unconscientious conduct had brought into existence, contended that no such law of equity ought to be applied to an action of the present description, in which the suitor might have resorted indifferently to a court of law or equity, the latter in such case being bound to act in obedience to the statute. He alleged that in substance the cause of action was in the present case the subject of "an action on the case" at law, within the very language of the statute, and which therefore, he said, a court of equity was as much bound to obey as a Court of law.

Now, if I had been called upon to decide this case in the absence of the provisions of the Judicature Acts, I should have been limited to the consideration of the judicial construction of the statute as applicable to an action at law, as laid down by courts of law as distinguished from courts with equitable jurisdiction; and it would have been necessary in such a case to consider in the first place what is at law the cause of action in such a case, and at what period it accrues.

The making of the fraudulent representation complained of is, no doubt, the first step going to the existence of a cause of action: but the fraudulent representation does not of itself give a cause of action; damage to the plaintiff must ensue before that comes into existence. Moreover, fraud and damage only bring into existence a cause of action when the plaintiff elects to treat it as such, and seeks to avoid the transaction, which in no case can he of course do until he has discovered his right to elect; or has so omitted to make use of reasonable means at his command for making the discovery, as to make it unjust not to treat the

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omission as equivalent to a discovery, and so to hold the plaintiff as having been put upon his election.

This question, if question it is, is in the present case involved in the traverse of the allegation that the cause of action did not accrue within the six years; and it may be that, if upon that traverse the plaintiff is able to prove the original and continuing fraud and his inability by due diligence to discover it up to a period within six years before the commencement of the action, he may be entitled to a verdict upon that issue. But the question raised before me is on demurrer, which, admitting as it does the averment in the plea that the cause of action did accrue more than six years, seeks to exclude the application of the statute by the allegation that he did not in fact discover and could not by reasonable diligence have discovered the existence of his cause of action before that period, and at all events that the statute is no bar where the fraud has been "actively concealed" or brought about by the defendant himself.

Now, at law the matter seems to have stood thus:—"Action on the case," as used in the statute, was a general term including actions on assumpsit or contract, actions for negligence or for fraud, and for other causes of action; and it was well settled that in actions on assumpsit the time ran from the breach of contract, for that was the gist of the action, and the subsequent damage, although happening within the six years next before the suit, did not prevent the application of the statute: *Battley* v. *Faulkner*. (1) The like rule obtained in actions on the case for negligence: *Short* v. *M'Carthy* (2); *Howell* v. *Young*. (3)

In the case of actions on the case for fraud, the authorities stand thus:—In *Bree* v. *Holbech* (4), which was an action in form for money had and received, but really to avoid a transaction on the ground of fraud, in answer to a plea of the statute the plaintiff replied that he had been induced to pay the money in consequence of false affirmations, and that he did not discover the fraud until within six years; and, on demurrer to the replication, Lord Mansfield, whilst holding that the plaintiff could not recover, on the ground that in that particular case no fraud by the defendant

(1) 3 B. & A. 288.
(2) 3 B & A. 626.
(3) 5 B. & C. 259.
(4) 2 Doug. 654.

was alleged, said: "There may be cases which fraud will take out of the Statute of Limitations;" adding that, "if the defendant had discovered the forgery and then got rid of the deed as a true security, the case might have been different," and gave leave to the plaintiff to amend, if upon inquiry the facts would support a charge of fraud,—thus shewing that in his opinion there would then be something for the defendant to answer.

Later on, in *Clark* v. *Hougham* (1), the plaintiff sued in assumpsit to recover an over payment of money to his landlord, alleged to have been paid upon a misrepresentation by the defendant, and the Statute of Limitations was pleaded, with a replication of accrevit infra sex annos. It was argued that at law the statute did not run in case of fraud until discovery; and it was admitted that such had been held in equity: but, whilst all the judges held that upon the pleadings as framed the defendant was entitled to judgment, Bayley and Holroyd, JJ., said that there should have been a special replication; and Best, J., having observed during the argument that the defendant had been active in concealing the fraud, said that fraud would have prevented the operation of the statute had it been specially replied,—referring to what Lord Mansfield said in *Bree* v. *Holbech.* (2) Still later on, in the case of *Imperial Gas Light Co.* v. *London Gas Light Co.* (3), the plaintiffs sued in the first count for taking away gas from the plaintiffs' pipes, and in the second count for fraudulent concealment till six years had elapsed. To the first count the defendants pleaded the statute, to which the plaintiffs replied the fraudulent concealment alleged in the second count. The defendants demurred to the second count, and also to the replication to the first count; and after argument the Court held that the second count was good, but gave judgment for the defendants on the demurrer to the replication. The Court did not however give a formal judgment, or any reasons for their decision; and I am not aware of any subsequent authority at law upon the point.

In the present case it is however unnecessary for me to decide how the matter would have stood if my jurisdiction had been limited to that of a court of law; for, by the 24th section of the

(1) 2 B. & C. 149. (2) 2 Doug. 654.

(3) 10 Exch. 39.

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Judicature Act, 1873, I am in a case like the present bound to give to the plaintiff the same relief as ought to have been given to him by the Court of Chancery in a suit instituted for the same or like purpose; and, in the Court of Chancery, the authorities in such a case as the present have been uniform for nearly two hundred years.

In 1714, in the case of *Booth* v. *Lord Warrington* (1), Lord Warrington filed a bill to recover back a sum of 1050*l.* which had been obtained from him by the defendant by fraud in the year 1702, and which fraud he alleged in his bill he had not discovered for nine years, i.e., not until within six years before the commencement of the suit. The defendant pleaded the Statute of Limitations: but Lord Chancellor Harcourt overruled the plea, on the ground that the plaintiff's title to relief was based upon the defendant's fraud; and his judgment was affirmed by the House of Lords, and Lord Warrington had his decree. The grounds of the decision are not stated in the report: but the questions which were laid down for argument were, 1. Would an action at law lie,—2. When the cause of action accrued,—and 3. Whether, where fraud is not discovered until after six years, a court of equity is barred from giving relief on a bill filed after that date but within six years. But, although the reasons of this decision are not reported, they were stated by Lord Redesdale in the subsequent case of *Hovenden* v. *Lord Annesley* (2), in which he said that the principle of that case was that fraud is a secret thing, and may remain undiscovered until such a time that the statute might run, but during that time the statute should not operate, because until discovery the title to avoid the transaction does not arise. A similar doctrine is laid down in the case of *South Sea Company* v. *Wymondsell* (3), in *Blair* v. *Bromley* (4), *Whalley* v. *Whalley* (5), and *Ecclesiastical Commissioners* v. *North Eastern Ry. Co.* (6), *Denys* v. *Shuckburgh* (7) was an analogous case of a bill filed for relief on the ground of mistake; and Alderson, B., holding that the case was in reference to the question of time on the same

(1) 4 Bro. P. C. 163.
(2) 2 Sch. & Lep. 607, 629.
(3) 3 P. Wms. 143.
(4) 5 Hare, 542.
(5) 3 Bligh, 1.
(6) 4 Ch. D. 845.
(7) 4 Y. & C. (Ex.) 42.

footing as fraud, came to the conclusion that the plaintiff in that case had had the means with proper diligence of discovering the mistake, and so adopted the statute as prescribing the limit within which he decreed an account.

This reasonable limitation, and indeed the whole doctrine of courts of equity on concealed fraud, is in terms stated in the Limitation Act of 3 & 4 Wm. 4, c. 27, s. 26, in which statute suits in equity are referred to as being within its provisions.

In reference to the decision of Malins, V.C., in the case of *Ecclesiastical Commissioners* v. *North Eastern Ry. Co.* (1), above cited, it was urged by Mr. Harrison for the defendants, that that case was not of binding authority, by reason that the Vice-Chancellor had not duly given effect to a decision of the Court of Exchequer in the case of *Hunter* v. *Gibbons* (2), in which in answer to an action of trespass the plaintiff sought to file an equitable replication of concealed fraud to the plea of the statute. But, on reference to the case of *Hunter* v. *Gibbons* (2), I am inclined to think that the Vice-Chancellor's view of it was well founded; and that the main ground of the decision in that case was that the replication did not shew any title in the plaintiff to such an unconditional relief as entitled him to set up the fraud in an action at law, according to the construction which had been put upon the provisions of the 85th section of the Common Law Procedure Act, 1854, entitling parties to set up equitable grounds for relief.

Upon these cases, and for the reasons stated in them, I have come to the conclusion that concealed fraud and absence of reasonable means of discovery, if pleaded, will prevent the application of the statute; and I therefore overrule the demurrer to the replication, and I give judgment upon it for the plaintiff.

There is also the cross-demurrer of the plaintiff to the rejoinder of non accrevit infra sex annos to the frauds stated in the replication; and that demurrer seems to me to be well founded. In one sense those matters are not stated as causes of action in themselves; they are only alleged as the grounds why the plaintiff, in the exercise of reasonable diligence, was not able to discover the original fraud: but it has always been held a bad plea to say non

(1) 4 Ch. D. 845.

(2) 1 H. & N. 459; 26 L. J. (Ex.) 1, 4.

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assumpsit infra sex annos, the true plea being non accrevit; the reason being the same as exists here, viz. it is not because the frauds perpetrated for the purpose of concealing the fraud occurred more than six years that the action is barred, if the non-discovery of the fraud caused by those means lasted until within the statutable period.

Upon this demurrer I also give judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *R. Miller & Wiggins.*
Solicitors for defendant: *Clarke, Rawlins, & Clarke.*

J. S.

Dec. 17.

THE QUEEN (ON THE PROSECUTION OF THE EAST HAM LOCAL BOARD) *v.* BARCLAY AND ANOTHER, JUSTICES OF ESSEX.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 211—*Owner rated instead of Occupier—Rate in respect of Tenements whether Occupied or Unoccupied—Reduced Estimate—Proportion of Annual Value.*

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211—which enables the owner to be rated to general district rates instead of the occupier, with a proviso that in cases where the owner is rated instead of the occupier he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of the net annual value; and when such reduced estimate is in respect of tenements, whether occupied or unoccupied, then such assessment to be made on one half of the amount at which such tenement would be liable to be rated if they were occupied and the rate levied on the occupiers—gives a compulsory power to the local authority to rate the owner in respect of premises whether occupied or unoccupied, but subject to the obligation of making the assessment upon one-half of the rateable value.

RULE calling upon two justices for Essex to shew cause why a mandamus should not issue, commanding them to issue a distress warrant against the goods of Richard Weaver to levy 6*l.* 15*s.* the arrears of a general district rate made for East Ham, Essex, on the 9th of November, 1880.

It appeared from the affidavits that the East Ham Local Board, having made a rate for general district purposes under the Public

Health Act, 1875 (1), passed a resolution on the 25th of March, 1879, that the owners of property let upon monthly or weekly tenancies should be rated instead of the occupiers; that they be rated whether occupied or unoccupied, and that they be rated at two-thirds of their rateable value.

On the 9th of November, 1880, a rate was made on Richard Weaver in pursuance of this resolution, and a summons was subsequently taken out for him to shew cause why a distress warrant should not issue in respect of the arrears due from him. It then appeared that he was rated in respect of twenty-seven cottages let upon weekly tenancies, of which he was owner. Twenty of these cottages were unoccupied at the time of making the rate,

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1, "with respect to the assessment and levying of general district rates under this Act the following provisions shall have effect, namely (1), general district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of poor, and shall be assessed on the full net annual value of such property, ascertained by the valuation list for the time being in force, or, if there is none, by the rate for the relief of the poor made next before the making of the assessment under this Act, subject to the following exceptions, regulations, and conditions, namely, (*a*) the owner, instead of the occupier, may at the option of the urban authority be rated in cases where the rateable value of any premises liable to assessment under this Act does not exceed the sum of ten pounds; or where any premises so liable are let to weekly or monthly tenants; or where any premises so liable are let in separate apartments; or where the rents become payable or are collected at any shorter period than quarterly: Provided that in cases where the owner is rated instead of the occupier he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of the net annual value; and where such reduced estimate is in respect of tenements whether occupied or unoccupied, then such assessment may be made on one half of the amount at which such tenements would be liable to be rated if the same were occupied and the rate were levied on the occupiers.

Sub-s. 2. "If at the time of making any general district rate any premises in respect of which the rate may be made are unoccupied, such premises shall be included in the rate, but the rate shall not be charged on any person in respect of the same while they continue to be unoccupied; and if any such premises are afterwards occupied during any part of the period for which the rate was made and before the same has been fully paid, the name of the incoming tenant shall be inserted in the rate, and thereupon so much of the rate as at the commencement of his tenancy may be in proportion to the remainder of the said period shall be collected, recovered, and paid in the same manner in all respects as if the premises had been occupied at the time when the rate was made."

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and so continued up to the time of the hearing of the summons. There had been no appeal against the rate.

The justices were of opinion that as regarded the unoccupied cottages s. 211 of the Public Health Act, 1875, did not enable the local board, if they rated tenements whether occupied or unoccupied, in their discretion to assess them at two-thirds of their annual value, and they refused to make any order upon the summons as to the houses so unoccupied.

The defendant in person appeared to shew cause, but the Court called upon

Tindal Atkinson (*W. J. Grubbe*, with him), in support of the rule. The assessment made by the local board is warranted by s. 211. The whole of the proviso must be read together, and is applicable to that part of the section which gives power to rate the owner instead of the occupier. A compulsory power is given to the local authority to rate the owner in respect of premises whether occupied or unoccupied, and it is left to their discretion whether they will make the assessment upon one half of the rateable value. This appears by contrasting the word "shall" in the first part of the proviso with the words "such assessment may be made" in the latter part.

FIELD, J. I am of opinion that the rule for a mandamus must be discharged. The original basis of rateability under the Poor Law Acts was occupation, and it is only in more recent times that, upon grounds of convenience and advantage to those levying the rate, as well as to owners of property, provisions have been introduced for rating owners in certain cases instead of occupiers.

The Act 32 & 33 Vict. c. 41, the Poor Rate Assessment and Collection Act, 1869, is the most recent Act dealing with the rating of owners instead of occupiers, for the purposes of the poor rate, and a comparison of the provisions of this Act with the provisions of the Public Health Act, 1875, under which the present question arises with regard to rating, is of material assistance in ascertaining the construction of the provisions of the latter Act, the two enactments being in pari materiâ, the basis of liability under the latter Act being the occupation of property for the

time being assessable to the poor-rate. The general rule, therefore, is that no one is to be assessable to the General District Rate, unless he has such an occupation as would render him assessable to the poor-rate: *Hodgson* v. *Local Board of Carlisle* (1), and there is nothing in the general scope or subject-matter of the Public Health Act which indicates any intention of altering the general conditions of rateability as existing under the Poor Rate Assessment and Collection Act, 1869.

Now by the 4th section of the Poor Rate Assessment and Collection Act it is provided that the vestry may order the owners of rateable hereditaments in certain cases to be rated, and an absolute power is thus given to the vestry to order the owners to be rated. But it seems, with reason, to have been thought fair, where the owner is thus made liable compulsorily, that some reduction should be made in his favour, and accordingly it is also made imperative that the owner, if rated, shall be allowed a reduction of 15 per cent. on the amount of the rate, and the section goes on to provide that if the owner gives notice that he is willing to be rated for a certain term, whether the premises are occupied or not, he shall be allowed a further reduction not exceeding 15 per cent. The law at that time, as now, with regard to the poor-rate, was that, in the absence of special provision to the contrary, unoccupied premises were not the subject of rating, and we find that, in the same Act, s. 16, a special provision is inserted for the purpose of providing for the case of occupiers coming into occupation after the making of the rate of tenements unoccupied at the time of making it.

That being the state of the law with regard to the poor-rate, we have now to consider the language of the 211th section of the Public Health Act. With regard to the General District Rate, that section says: "General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property." An important proviso then follows, viz., that in cases where the owner is rated instead of the occupier, "he shall be assessed on such reduced estimate as the urban authority deem reasonable of

(1) 8 E. & B. 116.

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the net annual value not being less than two-thirds nor more than four-fifths of the net annual value"; and where such reduced estimate is in respect of tenements whether occupied or unoccupied, then such assessment may be made on one half of the amount at which such tenements would be liable to be rated if the same were occupied and the rate levied on the occupiers.

So far as the first paragraph of the proviso this legislation is analogous to that with regard to the poor-rate. The language is positive: it is that the authority may, in their discretion, rate the owner, but if so, the owner "shall" be rated on a reduced estimate fixed within nearly the same limits.

I pass over for the present the second paragraph of the proviso, and proceed to the 2nd sub-section of the 211th section, which provides that if at the time of making any general district rate any premises in respect of which the rate may be made are unoccupied, such premises shall be included in the rate, but the rate shall not be charged on any person in respect of the same while they continue to be unoccupied. Now I think that this sub-section applies as well to owners rated as to occupiers, for there are no words narrowing the effect of this part of the sub-section so as to exclude the case of owners. So that so far the result is that only occupied premises are the subject of rating, even where the owner may be rated; and, in consideration of the advantages to the district arising from the greater certainty of amount and convenience of collection, the owner in such case is to have a reduction of between one-third and one-fifth of the rate.

But in order to decide the present case I must now go back to the provision upon which it more particularly turns. A new power that never existed before is given by the second portion of the proviso to s. 211, sub-s. 1 (*a*): for by that power is given to the authority, whether the owner will or no, to rate the owner whether the premises are occupied or unoccupied, and so to alter one of the elementary conditions of rateability, viz., the necessity for occupation. Under the Poor Law Act that could only be done at the owner's will, but by this enactment it is entirely at the discretion of the authority whether they will take advantage of this power and rate the owner in respect of premises whether occupied or unoccupied. It seems clear to me that when this

second portion of the proviso applies, the 2nd sub-section to which I have referred does not apply, for the proviso gives to the owner a further reduction in the case of the assessment of the premises whether occupied or unoccupied, and therefore it cannot be that the owner so assessed is to be exempt altogether from the reduced assessment while the premises are unoccupied, or he would be getting a double benefit. Then we come to the language which causes the difficulty. The proviso proceeds to say that such assessment "may" be made on one half of the amount at which the tenements would be liable to be rated if the same were occupied, and the rate was levied on the occupiers, and it appears to me reasonably clear that the legislature intended that the owner should receive some further benefit if he is to be made to pay rates, whether he is receiving rent from the property or not. It was indeed argued on behalf of the authority that though the provision as against the owner is compulsory, and enables the authority to render the owner liable against his will to pay rates on the premises whether occupied or unoccupied, it is only discretionary on the part of the authority whether they will make him any further reduction or not, but this construction would involve this, to me, apparently unreasonable result, viz., that an owner who was rated under the general law would have his remedy under sub-s. 2 if the premises are unoccupied, and would be rated at four-fifths at the most, whilst at the discretion of the authority a man who was rated for premises, whether occupied or unoccupied, might be rated at four-fifths also, and so gain no benefit by the extension of his liability. It does not seem reasonable to suppose that the legislature intended to give an alternative so disadvantageous to the owner. In the enactments relating to the poor-rate, the legislature gives a further benefit to the owner when he consents to be rated on property whether occupied or unoccupied, which may be equal in amount to the reduction of 15 per cent. already provided for, and it seems to me that that legislation tends to shew that it was intended here that the owner should have a further reduction, if he is deprived of the exemption of unoccupied property for the advantage and convenience of those levying the rate. That seems to me to be the reason and justice of the thing. It was pointed out by Mr. Tindal Atkinson that the

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word "shall" is used in the former part of the section, and in the Poor Law Act of 1869, where it is intended that a thing shall be compulsory, and it was argued that the word "may" is primâ facie permissive. That is no doubt an argument of some weight, but it is not conclusive. The word "may" is capable of different constructions, and has in certain cases been construed as meaning "must," and the true rule as laid down in the case of *Reg.* v. *Bishop of Oxford* (1) is that the context and the surrounding circumstances must be looked at in order to see what in the particular case the construction should be. In the case before us there is an alteration of the general law as to rating, for before the second part of this proviso became law the rating authority could not without the owner's consent have rated him in respect of unoccupied premises. They had no power to do so except by virtue of a contract to that effect with him. Now for the first time an absolute power of doing so is given to them. It seems to me that the reasonable view is that they were given this power subject to the obligation of making the specified reduction in the amount of the rate. The whole system of the legislation on the subject appears to me to shew that the word "may" must be here construed as meaning "shall." It is a very well established rule for the construction of statutes that, if they impose a charge on the subject, they must be strictly construed as against the party in whose favour the charge is imposed. The conclusion at which I arrive is that the contention of Mr. Weaver is well founded, and that the rule for the mandamus must be discharged.

CAVE, J. I agree with the conclusion arrived at by my Brother Field with regard to the construction of the statute. With reference to the point suggested that this was matter of appeal, and not an objection to be taken before the magistrates, it is not necessary to express an opinion upon that, but I have at the present moment a strong opinion that the matter can be raised before the magistrates, inasmuch as it goes to the right to rate altogether.

Rule discharged.

Solicitors for prosecutors: *Wilson & Son.*

(1) 4 Q. B. D. 245, 525.

A. P. S.

CORY AND SONS *v.* BURR.

1881
Dec. 9.

Insurance, Marine—Policy—Construction—Perils insured against—Barratry—Warranty "free from Capture and Seizure"—Whether Barratry causing Capture within Warranty.

In a time policy of marine insurance the ordinary perils insured against (including "barratry of the master") were enumerated, and the subject-matter of insurance was warranted "free from capture and seizure." During the continuance of the policy, in consequence of the barratrous act of the master, the ship was seized and detained for smuggling. In an action on the policy to recover expenses incurred by the owner in obtaining her release:—

Held, that the loss must be imputed to the excepted perils, capture and seizure, which directly caused it, and not to the barratry of the master, and therefore that the underwriter was not liable.

SPECIAL CASE.

The material facts stated in the case and the arguments of counsel sufficiently appear in the judgments.

Webster, Q.C., Myburgh, and *Tyser,* for the plaintiffs.

Cohen, Q.C., and *Barnes,* for the defendant. In addition to the authorities mentioned in the judgments were cited *Goldschmidt* v. *Whitmore* (1), and *Powell* v. *Hyde.* (2)

Cur. adv. vult.

Dec. 9. The following judgments were delivered:—

FIELD, J. This is an action brought to recover from the defendant his proportion of a loss in respect of the ship *Rosslyn,* insured by the defendant and other underwriters on a time policy.

The policy enumerated the ordinary perils insured against, and also contained a warranty against "capture and seizure."

The facts were stated in a special case, and raised the question which was argued before us whether the loss was to be treated as a loss by barratry of the master, in which case it was within the assurance effected by the policy, and so recoverable, or whether it was a loss by capture and seizure, and so within the warranty as an excepted peril.

(1) 3 Taunt. 508. (2) 5 E. & B. 607.

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The facts were as follows:—

On the night of the 23rd of May, 1879, the master of the *Rosslyn*, in consideration of 30*l.*, took on board at Gibraltar eight tons of tobacco, which he was to deliver on board a vessel for the purpose, as he knew, of being smuggled into Spain.

It was admitted that this was "barratry" of the master within the meaning of the policy; that by it he exposed his ship, as he well knew, to the risk of being seized by Spanish revenue officers.

The ship having left Gibraltar with the tobacco on board was so seized and taken into Cadiz, where the master and crew were placed under arrest on a charge of smuggling, and proceedings were taken to procure sentence of condemnation and confiscation of the ship.

To prevent this result the plaintiffs incurred heavy expenses, and were compelled to pay a large sum of money to get back their ship, and it was to recover the defendant's proportion of these payments and expenses, amounting to 8*l.* 18*s.* 11*d.*, that this action was brought.

Now the ordinary maxim applicable to losses by perils assured against, when in the chain of causes the loss may be referred to more than one of those perils, is to assign it to its proximate, and not to its remote, cause, and in a case therefore where a ship insured under a policy limited to capture and seizure, and not extending to perils of the seas, was driven on a hostile coast by those perils, and so became a prize to a captor, the loss was held to be within the policy, no separate loss having occurred before the happening of that event: *Green* v. *Elmslie.* (1) But the case of loss by barratry does not fall within this general rule, and to recover for a loss so caused it is not necessary that the barratrous act should be, and indeed it hardly ever is, the proximate cause of loss, and therefore a loss traceable remotely to, may be recovered as a loss by, barratry.

Thus, in the case of a ship being dashed to pieces by the sea, and lost in consequence of drifting caused by a barratrous act, it was held that the loss might be recovered for either as a loss by perils of the sea or by barratry: *Hayman* v. *Parish.* (2)

(4) 1 Peake, 278. (2) 2 Camp. 148.

So also a loss by capture, which was made by reason of a barratrous agreement for that purpose entered into by the master with the captor, was held recoverable as a loss either by capture or barratry, at the option of the assured: *Arcangelo* v. *Thompson*. (1) But in the cases thus decided there was not, as in the present case, any warranty against the proximate cause of loss, i.e. the capture and seizure, and they do not therefore go far enough to establish the plaintiffs' right in this case.

Neither does it appear to me that the cases of *Vallejo* v. *Wheeler* (2), and *American Insurance Co.* v. *Dunham* (3), cited on the part of the plaintiffs, established their contention, the grounds of those decisions not extending beyond the wording of the policies in those cases, which are not similar to the one which we have to decide upon.

In the present case it was admitted by Mr. Cohen in argument that the loss might possibly have been recovered for as barratrous if there had been no warranty in the policy, but the question in this case is whether, upon a true construction of the policy, the loss was occasioned by a peril assured against, or by one excepted; and in deciding that question we are bound, according to the ordinary rules of construction, to give effect to the whole policy, and if any construction sought to be put upon it would have the effect of rendering any of the language used null or ineffective, that construction must be condemned.

Now it has been held that where there is a warranty such as this, and the ship, being by perils of the seas placed in such a position as to be exposed to capture, is captured, the loss is to be assigned to the proximate cause—the capture, and not to the remote cause—the perils of the seas, and so is within the exception: *Livie* v. *Janson* (4); *Green* v. *Elmslie*. (5)

In *Livie* v. *Janson* (4) there was a warranty "free from American condemnation." The master sailed out of port in breach of an American embargo, and having sustained partial sea damage, the ship was seized and condemned by the American Government for the breach, and this was held a total loss by the excepted peril,

(1) 2 Camp. 620.
(2) 1 Cowp. 143.
(3) 12 Wend. N. Y. Rep. 463; 15 Ibid. 9.
(4) 12 East, 648.
(5) 1 Peake, 278.

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Lord Ellenborough saying that the substantive loss was imputable to such latter peril only, and not to the previous sea damage.

The consideration of these authorities, and the application of the well-known principle that a contract of insurance is one of indemnity, and indemnity only, leads me to the conclusion that the loss in the present case is imputable to the excepted peril.

It was correctly alleged by Mr. Cohen, on the argument, that capture and seizure are not in terms enumerated perils, but are or may be included in, or caused directly or remotely by, a great many of the perils actually enumerated: e.g. perils of the sea may be the remote cause of them, as in the case of *Green* v. *Elmslie* (1); or more frequently perils by men-of-war, or enemies, or pirates.

In these or similar cases, to hold that a capture caused by, or the direct result of, any of these perils is not within the exception would, it seems to me, be to deprive the latter of its whole, or at least a great part, of its effect and value.

As Mr. Cohen pointed out the warranty is not an extension but a limitation of the contract of insurance.

Capture and seizure, therefore, although not specifically included in the catalogue of perils insured against, must be found in some of them, and may be found in many, and amongst others (as this case shews) they may be the consequence of barratry which led to the act by which in truth the loss happened.

Until the seizure by the Spanish authorities, although a barratrous act had been committed, there had been no loss, and had the captain not been overhauled, there probably never would have been any. It was the seizure that brought the loss into existence.

The true mode of construction is, I think, to read the clause in which the perils are enumerated and the warranty together, and then it will stand thus: "assurer liable for loss by barratry, except such barratry as ends in or causes capture and seizure."

This construction gives effect to all the words used. There is capture and seizure to which the warranty applies, and there may be many acts of barratry which do not result in seizure, and are therefore properly assured against without exception.

(1) 1 Peake, 278.

Mr. Myburgh, on the contrary, asks us to read it thus: "free unless caused by barratry;" but if so, why not also read in all the other perils capable of producing seizure, and so render the exception nearly or absolutely nugatory.

I think therefore that, reading the whole policy, the true construction is that, if there is a loss directly caused by capture and seizure, as was the case here, the loss is not the less imputable to the excepted peril because it might remotely have been due to the barratrous act. My judgment is therefore for the defendant with costs.

CAVE, J. I also am of opinion that the defendant is entitled to succeed.

The master was clearly guilty of barratry which led to the seizure of the vessel, and there was therefore a loss by barratry, but a loss which primâ facie was within the warranty.

It was however contended on behalf of the plaintiffs that, there having been a loss by barratry, they were entitled to recover, although the proximate cause of the loss arose from seizure, and in support of this contention *Vallejo* v. *Wheeler* (1) was cited. In that case the vessel was assured by a voyage policy, and the master having barratrously deviated, it was held that the insurer was liable for a loss by perils insured against, whether such loss happened during the fraudulent deviation or afterwards. The ground on which it was held that the insurer was liable for loss by a peril happening after the fraudulent deviation was that, as there was a deviation, the owner, if not secured against the barratry of the master, would have lost his insurance by the fraud of the master. Now, if in this case it could have been shewn that the owner could not have recovered upon a policy against loss by seizure by reason of the barratrous conduct of the master, the principle of *Vallejo* v. *Wheeler* (1) would have applied, but it is clear from the cases of *Arcangelo* v. *Thompson* (2); *Heyman* v. *Parish* (3); and *Blyth* v. *Shepherd* (4), that the law is not so, and that under the circumstances of this case the insurer could have recovered under a policy against loss by a seizure.

(1) 1 Cowp. 143.
(2) 2 Camp. 620.
(3) 2 Camp. 149.
(4) 9 M. & W. 763.

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The case of *American Insurance Co.* v. *Dunham* (1) was also cited on behalf of the plaintiffs. In that case it was held that upon a policy against (among other perils) barratry of the master, the assured was entitled to recover damages sustained in consequence of the seizure and detention of the vessel and cargo by reason of prohibited goods having been found on board belonging to the master, shipped by him for the purpose of being smuggled, notwithstanding a clause in the policy that the insurer should be free from charge in consequence of seizure or detention for or on account of any illicit or prohibited trade. The ground of that decision, which was founded on *Havelock* v. *Hancill* (2), was that the warranty extended only to the acts of the assured, and of those acting with his knowledge and consent. It is clear that that ground cannot apply here, and if because perils from barratry are insured against it is to be held that the warranty against seizure does not extend to a seizure which is barratrous, or which is the natural result of barratry, it might equally be contended that, because perils from enemies are insured against, the warranty against capture does not extend to capture by an enemy.

In *Kleinwort* v. *Shepard* (3) there is an obiter dictum of Lord Campbell, which tends to support the view I take. In that case there was the same warranty as here, and Lord Campbell in his judgment, while discussing what is a seizure within the warranty, says, "If the crew intending to turn pirates were to murder the captain and to run away with the ship, would not this be a loss by seizure?" And it is evident from the context that in his opinion it would have been. If, therefore, a seizure, which is in itself the barratrous act, is within the exception, why is not a seizure which is not the barratrous act, but only a result and consequence of it?

Judgment for the defendant.

Solicitor for plaintiffs: *H. C. Coote, for Adamson, North Shields.*
Solicitors for defendant: *Waltons, Bubb & Walton.*

(1) 12 Wend. N. Y. Rep. 463; 15 Ibid. 9.
(2) 3 T. R. 277.
(3) 1 E. & E. 447.

W. A.

[IN THE COURT OF APPEAL.]

1881
Nov. 18.

ROBERTS *v.* DEATH.
CASTLE, GARNISHEE.
WELLS AND WIFE, CLAIMANTS.

Practice—Judgment Creditor—Attaching Debt under Garnishee Order—Trust Money—Rules of Court, 1875, *Order XLV., rules* 6, 7.

A garnishee order nisi, obtained by a judgment creditor to attach money owing to the judgment debtor, ought not to be made absolute if it be suggested, and there is reasonable ground for so suggesting, that the money sought to be attached is trust money, and not really the money of the judgment debtor, even though such suggestion be not made by the garnishee, and the case, therefore, not within Order XLV., rules 6 and 7. If the fact suggested be disputed, the proper order to make would be that the money should be paid into court to abide the event of an inquiry, whether it be trust money or not.

IN April, 1881, Michael Death recovered a judgment for 40*l.* 6*s.* debt and costs, against George Castle, whereupon John Roberts, who was a judgment creditor of Death, procured a garnishee order nisi to attach all debts due from Castle to Death, to answer the judgment recovered by Roberts against Death, on which 53*l.* 14*s.* 6*d.* then remained due. Before the day on which such order was returnable the solicitors for Death wrote to the solicitor for Roberts to inform him that Death was trustee for the claimant, Mrs. Wells, and that the money for which Death had recovered judgment against Castle belonged solely to Mrs. Wells. On the 31st of May, 1881, when the garnishee order nisi was returnable, Castle, the garnishee, attended in person before Master Dodgson, and as he admitted his debt, and made no suggestion that the money was trust money and belonged in reality to Mrs. Wells, the master, who refused to hear any statement by Death's solicitors that it was trust money, made the garnishee order absolute, and thereby ordered Castle to pay Roberts, the judgment creditor, the 40*l.* 6*s.* Castle accordingly paid the money over to Roberts.

A summons was then taken out by Mr. and Mrs. Wells and Death to shew cause why the order of the 31st of May should not be rescinded or varied by directing the payment into court

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of the 40*l.* 6*s.*, to abide the event of an issue between the judgment creditor and the judgment debtor, and the claimants, Mr. and Mrs. Wells, or some of them.

This summons was dismissed by the master, and on appeal, the dismissal was affirmed, first by Mathew, J., at Chambers, and subsequently by the Queen's Bench Division.

The judgment debtor and claimants then appealed to this Court.

Horne Payne, for the appellants. As the garnishee did not suggest that the debt sought to be attached was trust money, the master decided that the case did not come within Order XLV., rule 6 (1), and he therefore refused to hear the claimants, or any suggestion by them that it was trust money.

[BRETT, L.J. The master was right in saying that it did not come within rule 6.]

If not within rule 6 it is within rule 7 (2), which is copied from s. 30 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126).

[BRETT, L.J. That rule 7 seems only to apply where the third person has appeared under such order, viz., the order referred to in rule 6.]

The Court is not bound to make the order for attaching the debt, as it is in the discretion of the Court to make it or not as it thinks fit, and now, at all events since the Judicature Acts, the Court is endowed with an equitable power, and may act on the

(1) Order XLV., rule 6: "Whenever, in proceedings to obtain an attachment of debts, it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or judge may order such third person to appear and state the nature and particulars of his claim upon such debt."

(2) Order XLV., rule 7: "After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Court or judge may order to appear, or in case of such third person not appearing when ordered, the Court or judge may order execution to issue to levy the amount due from such garnishee, or any issue or question to be tried or determined according to the preceding rules of this order, and may bar the claim of such third person, or make such other order as such Court or judge shall think fit, upon such terms in all cases with respect to the lien or charge (if any) of such third person, and to costs as the Court or judge shall think just and reasonable."

information of any one besides that of the garnishee, that the debt sought to be attached does not belong to the judgment debtor, but is trust money of which he is a trustee for other persons.

Cyril Dodd, for the judgment creditor. The master acted rightly in making the order absolute. Neither rule 6 nor rule 7 of Order XLV. apply to this case, as there was no suggestion by the garnishee that the debt belonged to any one else than the judgment debtor.

[COTTON, L.J. Is it not within rule 7?]

That rule does not apply unless the Court or judge could make an order under rule 6 for the third person to appear and state the nature of his claim, and, therefore, if the case is not within rule 6, it is also not within rule 7.

[BRETT, L.J. Do you say that a judge would be bound to order the garnishee to pay over the debt to the judgment creditor even though it should be trust money, belonging, therefore, really not to the judgment debtor but to another person—can he not refuse to make any such order?]

The judge has only power to act according to these rules. Even if, as an equity judge, he now has an equitable jurisdiction, he ought not to exercise it under such proceedings as these, but only after a ground for equitable relief has been established. Under these garnishee proceedings the master rightly considered that, in the absence of any suggestion by the garnishee, the only document he could look at was the judgment, and there was nothing on the face of it to shew that the money recovered was trust money. He therefore rightly made the garnishee order absolute.

Hammond Chambers, for the garnishee.

BRETT, L.J. The sum in question in the present case is small, and on that account I should have been unwilling to interfere had there not been involved in the matter a question of general importance, which might be of the greatest possible consequence in practice. The facts are these—Roberts obtains a judgment in an action against Death, and becomes his judgment creditor—Death in his own name, but as it is suggested (and with some plausible ground for such suggestion) really only as trustee for

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Mrs. Wells, obtains a judgment against Castle. Thereupon Roberts obtains a garnishee order nisi under which he endeavours to attach the judgment debt due from Castle to Death. Under these circumstances it seems to me that Castle might have suggested, according to Order XLV. rule 6, that the debt belonged to Mrs. Wells, but he did not do so, and the garnishee order was made absolute, but with the knowledge of Roberts as well as of Castle that there was a claim made on behalf of Mrs. Wells that the money belonged to her, and that the judgment so obtained by Death, was obtained by him as her trustee. Nevertheless, as no suggestion was made by the garnishee according to rule 6, the master was of opinion that the case was not brought within that rule, and that he had therefore no power to prevent the order from being made absolute. I agree with him that the case is not within rule 6, and that he could not act on that rule and as it is not within that rule, I also think it is not within rule 7. But the question is whether, assuming all this, the master was right in holding that he could not prevent the order from being made absolute. I think he was not, and that he could have done otherwise, acting under another power than under these rules. The order which he made was, that money which it is alleged had been recovered by a person as trustee should be paid over to the creditor of such trustee, who had therefore no right to it, since under those circumstances the money would not be the money of the trustee, but of the cestui que trust. It is said that because the garnishee did not suggest that that was the fact, the cestui que trust was stopped from shewing it; and further, it is said that such an injustice can be perpetrated by the order of the Court. I cannot believe in this. The rules 6 and 7 of Order XLV. on which reliance is placed as governing this matter, were copied from sects. 29 and 30 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), which was passed at the time when the Common Law Courts could not have given relief; whereas the Equity Court certainly could have done so. The garnishee order absolute would now be made by a master acting for a judge who, under the Judicature Acts, would have an equitable jurisdiction. The Equity Court, as it seems to me, would never have allowed the money of a cestui que trust to be applied to pay the debt of the trustee,

and I can see nothing which should prevent a judge from saying, when the matter is called to his attention, that a garnishee order shall not under those circumstances be made absolute. Although it is true the suggestion to that effect cannot be made by the cestui que trust under either rule 6 or 7, still it seems to me that a Court of Equity would listen to such a statement on the proceedings for a garnishee order, and would either, if there was no dispute as to the fact, then make an order that the money should be paid over to the cestui que trust, or decline to make the garnishee order absolute, or if there was a dispute as to whether the money was trust money, would consider it reasonable to order the money to be paid into Court to abide the event of an inquiry. Of course if there were no colour for saying that the money sought to be attached was trust money, the garnishee order ought not to be interfered with, but where there exists a reasonable colour for such a statement, as I think there does here, then the right order to be made would be in the terms asked for in the summons taken out by Mr. and Mrs. Wells, to which Death was a party. The point of practice, however, which we hold is that where the money sought to be attached under the garnishee proceedings is trust money, or said to be such on any reasonable ground, the cestui que trust is not to be damaged because the garnishee will not act, but he has a right to come forward (not indeed under rules 6 and 7, but apart from such rules) and to inform the Court that the money is trust money belonging to him, and that therefore the garnishee order ought not to be made, provided, of course, he does so in due time.

COTTON, L.J. I am of the same opinion. The question really is whether if the judge be informed, before the garnishee order has been made absolute, that the money sought to be attached is trust money, and which ought not therefore to be taken for the payment of the judgment debt, he can hold his hand and refuse to make the order absolute. Here the money due to the execution debtor Death is alleged to be trust money, and it is clear that a Court of Equity always interfered to prevent goods which were held in trust from being taken in execution to satisfy the debt of the trustee. It is said that the judge could not

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refuse to make the order, because the case is not within the rules of Order XLV. I think it is not within rule 6, because that applies only where the garnishee for his own protection suggests that the debt belongs to a third person; but I am not satisfied that it is not within rule 7, for that says, not merely on hearing the allegation of such third person, but "of any other person whom by the same or any subsequent order, the Court or judge may order to appear," and that seems to me to give power to the Court or judge to cite any one else, and to inquire as to the nature of his claim. But I do not rely on that, as I am of opinion that whenever the judge is informed on any reasonable ground that such an order ought not to be made, he should withhold making the garnishee order absolute for taking the money of one person to pay the debt due from another. In the present case, there was as I assume a primâ facie case made out, that the money sought to be attached was trust money: therefore, in my opinion, it should have been ordered to be brought into Court to abide the event of an inquiry as to whether it was trust money or not.

LINDLEY, L.J. I am of the same opinion. The point in this case is a new point of practice, and I am not surprised that the master before whom it came, not being acquainted with the old Chancery practice, did not see his way to get over the difficulty it presented. Now Roberts having obtained a judgment against Death, he, Death, obtained a judgment against Castle, but it has been shewn that this last judgment was obtained by Death as trustee, so that the money he recovered would not be his money, and therefore Roberts, his judgment creditor, ought not to have it under these garnishee proceedings. Then how is that to be prevented? Formerly there would have been no difficulty at all, as a bill in Chancery would have been filed, and an injunction granted against Roberts receiving the money, but that cannot be now resorted to. What was done here was this; before the garnishee order was made absolute, notice was given to Roberts and his solicitor that the judgment was recovered by Death as trustee for Mrs. Wells, and that, therefore, Roberts had no business to take it, and when the parties were before the Master

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the latter was informed that it was not Death's money. Then there was a difficulty as to what the order should be, and because the case did not come within rules 6 and 7 the master made the order absolute. I think he put a too narrow construction on those rules in refusing to hear a suggestion from any one but the garnishee. In my opinion this appeal should be allowed, and Roberts having got the money with notice that it was not Death's should be ordered to pay it into court to abide the event of an inquiry whether it is trust money or not.

Appeal allowed.

Solicitors for claimants: *Yorke & Wharton.*
Solicitor for judgment creditor: *W. T. Boydell.*
Solicitor for garnishee: *Castle.*

W. P.

[IN THE COURT OF APPEAL.]

Dec. 8

BOWLES *v.* DRAKE & Co.

Practice—Action remitted to County Court—County Courts Act, 1867 (30 *&* 31 *Vict. c.* 142), *s.* 10—*Appeal—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 45.

Where a cause has been remitted for trial before a county court under s. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), it becomes a county court cause, and the determination of a Divisional Court, on appeal from the decision of the county court judge, is within s. 45 of the Judicature Act, 1873, and therefore final, unless special leave to appeal be given.

THIS was an action for damages in respect of injuries sustained by the plaintiff by the alleged negligence of the defendants. The action was ordered to be tried before the Westminster County Court, under the 10th section of 30 & 31 Vict. c. 142. (1) It was

(1) By 30 & 31 Vict. c. 142, s. 10, power is given to a judge of the superior Court in which an action of tort is brought, to order, in the event of the plaintiff failing to give such security as is there mentioned, or to satisfy the judge that he has a cause of action fit to be prosecuted in the superior Court, "that the cause be remitted for trial before a county court to be therein named." That section afterwards enacts that "the county court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed by a memorandum signed by them that the said county court should have power to try the said action, and the same had been commenced by plaint in the said county court."

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tried there twice. At the first trial the jury gave a verdict for the plaintiff for 150*l*.

The defendants afterwards applied to the county court judge for and succeeded in obtaining a new trial on the ground that the verdict was against the evidence. On that second trial the county court judge directed a nonsuit.

The Queen's Bench Division on motion on behalf of the plaintiff, by way of appeal from the county court, ordered the nonsuit to be set aside, and a new trial to be had. No leave to appeal was given, but, notwithstanding, the defendants appealed to this Court.

J. Vesey Fitzgerald, for the plaintiff, objected to the hearing of the appeal. The action was taken to the county court under s. 10 of 30 & 31 Vict. c. 142, the effect of which was that the action then became a county court action: *Moody* v. *Steward* (1); Pitt Lewis' County Court, vol. i. p. 707.

When the present case was before the Queen's Bench Division it was treated as an appeal from the county court, and, moreover, the defendants having themselves, after the first trial, applied to the county court judge for a new trial (which they ought not to have done if it was not a county court action), are now estopped from saying it is not a county court action. Then, if so, according to the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45, there can be no appeal from the Divisional Court without leave.

H. T. Kemp, for the defendants. This case is not governed by s. 45 of the Judicature Act, 1873, the action being not a county court action, but one in the High Court, where it was brought. The 10th section of 30 & 31 Vict. c. 142, empowers only the judge to order "the cause to be *remitted* for trial before a county court." The language of that section is very different from that of s. 8 of the Act, which enables certain causes in the Chancery Court to be "*transferred* to the county court," and that section expressly says not only that such actions are to be transferred to the county court, but that "the parties thereto shall have the

(1) Law Rep. 6 Ex. 35.

same right of appeal that they would have had had the suit or proceeding been commenced in the county court." That is different in the case of common law actions sent to the county court for trial under s. 10, or under s. 7 (which last relates to actions of contract where the claim does not exeeed 50*l*.). These are not transferred to the county court, but are only sent there for trial, and in other respects remain in the High Court. The case of *Moody* v. *Steward* (1) only decided that the cause having been remitted to the county court the superior Court could not make any order for costs.

JESSEL, M.R. I think that when one looks at the section under which this cause was remitted for trial before the county court, it is clear that it does not mean that the cause is still to remain in the High Court. The reason for sending it to the county court is, because the plaintiff has no visible means of paying the costs. Then when it is so sent, what is to happen? Section 10 says that "the county court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed by a memorandum in writing signed by them that the said county court should have power to try the said action, and *the same had been commenced by plaint in the said county court.*" If, however, the defendants could sustain their right to appeal in this case, there could be a motion made for a new trial both in the county court and in the High Court. It appears to me, however, looking at the nature of the case, and that the cause is sent to the county court for cheapness, and because of the plaintiff's impecuniosity, that the obvious mischief which the enactment was intended to remedy would be frustrated if this appeal could now be heard. The action when remitted to the county court under this 10th section is, in my opinion, a county court action, and is subject only to the same right of appeal as any other county court action. This appeal, therefore, cannot be heard.

BRETT, L.J. I am of the same opinion. Though there is a difference in the language of the three sections, 7, 8, and 10, of

(1) Law Rep. 6 Ex. 35.

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30 & 31 Vict. c. 142, yet they all I think, in effect, transfer the cause to the county court. The 10th section does not say when the cause has been remitted for trial that the county court shall have all the same powers with respect to *the trial* as in a county court case, which it would say if the contention on behalf of the defendants was correct, but it says that the county court shall have all such powers with respect to *the cause*,—so that in effect it is the same as if the whole cause had been transferred to the county court. On looking at *Moody* v. *Steward* (1), it will be seen that Bramwell, B., in delivering the judgment of the Court of Exchequer, took the same view of that section which we are now taking, though he did not decide more than was necessary for the purpose of disposing of the question in that case, which was as to the plaintiff's right to an order for costs. "For the purposes of the present application," he states, "it will be sufficient to say that we are of opinion that we have no power to make the order." Then he gives this reason for the judgment: "The whole cause has gone to another court, and is no longer within our jurisdiction." That reasoning applies here. The whole cause has gone, and no part of it is within our jurisdiction. It is practically transferred to the county court with all the consequences attendant thereon.

COTTON, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Surr, Gribble, & Co.*
Solicitor for defendants: *Steele.*

(1) Law Rep. 6 Ex. 35, at p. 36.

W. P.

[IN THE COURT OF APPEAL.]

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HORNBY *v.* CARDWELL; HANBURY, THIRD PARTY.

Practice—Costs—Third Party—Jurisdiction of Court to order to pay Plaintiff's Costs—Appeal as to Costs—Judicature Act, 1873, *s.* 24, *sub-s.* 3, *and s.* 49 *—Order L V.—Contract of sub-Tenant to perform Covenants of head-Lease, whether Contract of Indemnity.*

The High Court has jurisdiction to order a third party to pay to an unsuccessful defendant the costs payable by such defendant to the plaintiff.

Per Brett and Cotton, L.JJ.: The contract of a sub-tenant to perform the covenants of the head-lease is a contract of indemnity.

The plaintiff let to the defendant a house, for twenty-one years with option to determine the lease at the end of seven or fourteen, by deed containing covenants by the defendant to repair and paint and leave in repair. The defendant, after having occupied for five years, sublet the house to H. for the remainder of the first seven years by a writing with a clause, that "the letting should be subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein." At the end of the seven years, the defendant having determined the lease in the exercise of his option, the plaintiff claimed from the defendant, and the defendant claimed from H., the amount at which dilapidations had been assessed by the plaintiff's surveyor. H. declined to pay or to give the defendant an indemnity, or to take any responsibility in the matter. The plaintiff sued the defendant, who brought in H. as third party. The issues, as between the plaintiff and the defendant, and the defendant and H., were referred separately to an official referee, who reported that the sum claimed by the plaintiff was due from the defendant to the plaintiff, and that a similar sum was due from H. to the defendant.

A Divisional Court (Lord Coleridge, C.J., and Field, J.), on adopting the second report, ordered H. to pay all costs as between the plaintiff and the defendant:—

Held, by the Court of Appeal (Jessel, M.R., Brett and Cotton, L.JJ.), that these were costs within the discretion of the High Court, and therefore that this order was not appealable; and by Brett and Cotton, L.JJ., that H.'s contract was a contract of indemnity, under which the defendant was entitled to recover from H. all the costs of an action by the plaintiff against the defendant reasonably defended.

APPEAL of third party from the judgment of a Divisional Court, overruling demurrer of third party to defendant's statement of claim, and ordering the third party to pay the costs of the plaintiff.

This was an action by the plaintiff on a repairing lease against his tenant, the defendant, in which the defendant brought in his sub-tenant, Hanbury, as third party.

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In the year 1872, the plaintiff by deed let to the defendant a house and garden in Reigate at the yearly rent of 65*l.* for a term of twenty-one years, determinable by the tenant at his option at the end of the first seven, fourteen, or twenty-one years. This lease contained covenants by the tenant to repair and keep in repair throughout the term, to paint the outside of the premises once in every three, and the inside once in every seven, years, and at the expiration or other sooner determination of the term to deliver up the premises in good and tenantable repair, &c.

The contract of sub-tenancy, which bore date the 30th of June, 1877, after reciting that the premises were let by the plaintiff to the defendant for the aforesaid term, proceeded as follows:

> Now the said W. A. Cardwell hereby agrees to let and the said F. B. Hanbury agrees to take from the 24th day of June, 1877, for the term of two years and one quarter of another year, the same premises at the reduced rent of 55*l.* per annum. And it is also agreed by the parties hereto that this letting shall be subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein, the said W. A. Cardwell electing to determine his tenancy by notice to the said Sir E. G. Hornby at the end of the first seven years from the commencement of his lease. And the said F. B. Hanbury further agrees that he will at the expiration of his term leave the said house and premises in good tenantable repair, and also that he will leave the garden in good order.

The plaintiff having determined his tenancy in accordance with the above agreement, the tenancy and the sub-tenancy both came to an end on the 29th of September, 1879, on which day the defendant and Mr. Hanbury inspected the premises together. The premises having been surveyed after resumption of possession by the plaintiff, with a view to the assessment of dilapidations under the original lease, the plaintiff claimed the amount at which such damages were assessed from the defendant, who on his own part claimed them from Mr. Hanbury, or, in the alternative, that Mr. Hanbury should indemnify him against an action by the plaintiff; but Mr. Hanbury declined to pay the amount claimed, or to give any indemnity, or to take any responsibility of a defence to the action, contending that he was liable upon his own agreement only. The plaintiff then brought his action against the defendant on all the repairing covenants in the original lease, the writ being issued on the 15th of November, 1879. The statement of defence having been delivered on the

12th, issue was joined on the 20th of January, 1880. Mr. Hanbury was brought in as third party by an order made on the 14th of January, 1880, notice was served on him under Order XVI., rule 18, on the 21st, and an appearance entered for him on the 29th of the same month. The plaintiff had already given notice of trial, and the cause had been sent down for trial at Kingston, the commission day being Monday, the 2nd of February. On the 31st of January an order was made by a master that the third party be at liberty to attend the trial and adduce evidence and cross-examine witnesses, the question of the third party's liability to be determined in a separate action unless disposed of with the sanction of the judge at the trial. At the Kingston assizes (at which Mr. Hanbury did not appear) the issues in the action as between the plaintiff and the defendant were referred by Lopes, J., to an official referee for report. Shortly afterwards the order of the master was amended by an order of Field, J., that the defendant should be at liberty to deliver to the third party a statement of claim, and that the third party's liability in the action should be tried after the question of the defendant's liability had been determined.

In the statement of claim originally delivered on the 20th of February, the defendant claimed merely as on a contract of indemnity. Mr. Hanbury demurred on the ground that there was no contract of indemnity, and this demurrer was allowed, the defendant having leave to amend.

Before the defendant delivered his amended statement of claim, the official referee tried the issues between him and the plaintiff, and reported thereon, finding the covenants broken and assessing the damages at 54*l.* 2*s.* 6*d.* This report was adopted by the Court on the 31st of May, a paragraph in which the referee found the same amount to be due from Mr. Hanbury to the defendant being struck out.

In the amended statement of claim the defendant charged breaches by Mr. Hanbury of his agreement, and claimed from him the said sum of 54*l.* 2*s.* 6*d.*, and the costs of defending the plaintiff's action.

To the claim for costs Mr. Hanbury demurred.

Field, J., on the 15th of December ordered the issues of fact to

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be tried by the same official referee who had tried the issues between the plaintiff and the defendant, and a Divisional Court affirmed this order on appeal.

On the 22nd of March, 1881, the official referee made his second report, in which he found that when possession of the premises was given up by Mr. Hanbury, and at the expiration of the term mentioned in the agreement of the 30th of June, 1877, the house and premises were not in good tenantable repair, but were in a dilapidated condition and out of repair, and that the garden was not in good order; that the expense necessary to put the house in good tenantable repair and the garden in good order amounted to 54*l.* 2*s.* 6*d.*; that up to the date of the agreement the defendant had painted and repaired the premises in accordance with the covenants in the lease; that the sum of 54*l.* 2*s.* 6*d.* was expended in doing repairs, the necessity for which arose during the continuance of the agreement, and from the breach by the third party of the agreement; and that the defendant adduced evidence to shew that he had in the year 1880 paid certain costs of the plaintiff in the said action, and that he had incurred certain other costs in respect of his defence against the plaintiff's claim. But as the liability of the third party to pay the whole or any part or parts of either the plaintiff's or the defendant's costs depended on questions of law, the referee left this last matter to be dealt with as the Court might direct.

On the motion of the defendant this report was adopted, and judgment was entered for the defendant for 54*l.* 2*s.* 6*d.* against Mr. Hanbury, and the demurrer overruled by a Divisional Court (Lord Coleridge, C.J., and Field, J.), who ordered further "that the said F. B. Hanbury, third party, do pay to the defendant all costs of the action, including in the same costs paid by the defendant to the plaintiff and the costs of defending the claim of the plaintiff against the defendant."

The third party appealed against so much of this judgment as ordered that the demurrer of the third party should be overruled, and that the third party should pay to the defendant the costs paid by the defendant to the plaintiff and the costs of defending the claim of the plaintiff against the defendant.

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Cowie, and *Archibald*, for the third party. The discretion of the Court to give costs under Order LV. does not extend to allow costs to be given against the third party in this case. That discretion is expressly made "subject to the provisions of the Act." Now a third party is brought in under sect. 24 sub-s. 3 of the Act (1), which in terms preserves to him "the same rights as if he had been duly sued in the ordinary way by the defendant." If the third party had been sued by the defendant, he could not have been made to pay the costs of the plaintiff. Such costs are recoverable as damages only where they are the natural consequences of the defendant's default: *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (2); *Fisher* v. *Val de Travers Asphalte Co.* (3)

[JESSEL, M.R. In those cases there was no contract by the defendant to perform the contracts of the plaintiff.]

The contract of the sub-tenant to perform the covenants of the head lease is not a contract of indemnity: *Logan* v. *Hall.* (4)

[BRETT, L.J. In Smith's Leading Cases, vol. 1, p. 166, 8th ed. it is said in the notes to *Lampleigh* v. *Brathwait:* "It is very necessary to observe the distinction between the case of a contract to indemnify, or a contract to do the very thing to which the contractee is liable, and the breach of which consequently may raise an obligation to indemnify the contractee against such liability, and a contract to do something not precisely the same with that to which the contractee is liable." Your case seems to be within the first category.]

The defendant ought to have paid money into court, and not defended the action. At any rate, the third party ought not to

(1) Judicature Act, 1873, s. 24, subs. 3: "The said Courts . . . shall also have power to grant to any defendant . . . all such relief relating to or connected with the original subject of the cause or matter . . . claimed against any other person whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing . . . as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant."

(2) Law Rep. 10 Ex. 35.

(3) 1 C. P. D. (C.A.) 511.

(4) 4 C. B. 598.

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be liable for costs incurred before he was brought in; the word "thenceforth" in sub-s. 3 of sect. 24 of the Act shows this.

But a third party cannot be ordered to pay the plaintiff's costs in any case. It has already been held that the plaintiff will not be ordered to pay the third party's costs: *Williams* v. *South Eastern Ry. Co.* (1), and the rights of the parties must be reciprocal. If it be held that the third party may be ordered to pay the plaintiff's costs, it will follow that the plaintiff may be ordered to pay the third party's costs, and even the costs of any number of parties, for there seems to be no limit to the number who may be brought in. The costs which are within Order LV, are only the costs of the issues in respect of which they were incurred.

[They also cited *Treleven* v. *Bray* (2); *Witt* v. *Corcoran* (3); *Bower* v. *Hartley* (4); *Swansea Shipping Co.* v. *Duncan* (5); *The Cartsburn.* (6)]

Wallace, for the defendant. This case is within the rule laid down in Roscoe on Evidence, 14th ed. p. 667: "A lessee may recover the amount of dilapidations recovered against himself and occasioned by the under-lessee's neglect; and he may recover the costs of such action if he has given notice of it to the under-lessee, and received his sanction for defending it; and his sanction may be inferred if he does not prohibit the defence." If, therefore, the Court had no discretion to give these costs under Order LV., they were recoverable as damages. It is contended, however, that the Court has a discretion to give the costs. The terms of Order LV. are very wide, even extending to allow costs to be given against a successful party; *Dicks* v. *Yates.* (7) And the action between the plaintiff, defendant, and the third party is all one action. But if the Court had a discretion to give the costs, the case is within section 49 of the Judicature Act, which prohibits appeals "as to costs only, which by law are in the discretion

(1) 26 W. R. 352. Reference was also made to *Witham* v. *Vane* (Weekly Notes, May 21, 1881), upon which Jessel, M.R., remarked that the cases in the Weekly Notes cannot be cited as authorities. See also note to *Barter* v. *Dubeux*, 7 Q. B. D. at p. 414.

(2) 1 Ch. D. 176.
(3) 2 Ch. D. 69.
(4) 1 Q. B. D. 652.
(5) 1 Q. B. D. 644.
(6) 5 P. D. 59.
(7) 18 Ch. D. 76.

of the Court." On two grounds, therefore, the judgment of this Court ought to be for the defendant. [He was stopped.]

Cowie, in reply, cited *Penley* v. *Watts* (1); *Schneider* v. *Batt* (2); *Beynon* v. *Godden*. (3)

JESSEL, M.R. The first question in this case is whether this demurrer was properly overruled on the ground of being partial, and I am of opinion that it was, not being a demurrer to a distinct cause of action within the meaning of Order XXVIII. Rule 1, but only to a separate part of the relief claimed.

The second question, which is of very great importance, is one of jurisdiction. The appeal is from so much of the order appealed from as directed the payment of costs, including therein the "costs paid by the defendant to the plaintiff and the costs of defending the claims of the plaintiff against the defendant." The real question for us, therefore, is whether an appeal lies, because if the High Court had jurisdiction in its discretion to grant these costs, there is no appeal. The appellant, in order to succeed, must show that there was no jurisdiction to grant these costs: and to show this, reference is made to subs. 3 of s. 24 of the Judicature Act of 1873 and Order LV. The sub-section referred to prescribes that every person served with a third party notice "shall thenceforth be deemed a party" to the cause "with the same rights in respect of his defence as if he had been duly sued in the ordinary way," and Order LV. directs that "subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." It is argued for the appellant that the expression "with the same rights" is a "provision" of the Act which prevents Order LV. from applying to his case, but I do not think that it is a "provision" within the meaning of that Order. Before the Judicature Act, no doubt, the appellant would not have been liable to these costs in the plaintiff's action; but before the Judicature Act he could not have been made party to such action at all. It seems to me that a confusion has arisen between legal rights and rights to a particular procedure, and that it has been forgotten that to a particular procedure a man has no rights

(1) 7 M. & W. 601. (2) 50 L. J. (Q.B). (C.A.) 525. (3) 4 Ex. D. (C.A.) 246.

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at all, because no particular procedure can affect his legal rights. With regard to the word "thenceforth," I do not think that can have the effect of exempting the appellant from costs incurred by the plaintiff before he was made third party. Prior costs of a similar character might have become payable by a party similarly situated to the appellant, under the practice in equity in force before the Judicature Act, so that no new practice has been introduced. The fact is that the third party is a party, and liable as a party to the exercise of the discretionary powers of the Court. If those discretionary powers should be wrongly exercised, it is a misfortune for the third party, that is all. The legislature thought it better to run the risk of a judge making a mistake, than to allow an appeal from the exercise of these discretionary powers.

The decision of the Court below, therefore, was quite right.

BRETT, L.J. I should be very sorry indeed, if I thought that the judgment of the Court below could only be affirmed on the ground that these costs were in the discretion of the Court, and therefore not subject to appeal. I have much satisfaction in holding that the judgment can be affirmed also on the ground that these costs were recoverable as damages. The plaintiff sued the defendant for breach of the covenants in a lease, and the third party was made third party on the ground that it was through his default that the covenants had been broken, although the plaintiff could not sue him, because there was no privity of contract between him and the plaintiff. The Court below gave judgment for the plaintiff against the defendant, and for the defendant against the third party, by a judgment ordering that the third party pay the costs "including therein the costs paid by the defendant to the plaintiff and the costs of defending the claim of the plaintiff against the defendant."

If it be right to give the defendant these costs by way of damages, the judgment of the Court may properly be construed so to give them, and may therefore be supported on that ground.

Now that the damages which the plaintiff recovered from the defendant may be recovered by the defendant from the third party, is neither disputed nor doubtful, but the question whether the

costs could be recovered is a more complicated one, and depends upon the question whether the third party had entered into a contract of indemnity. I am of opinion that he had entered into such a contract. He had taken a sub-lease which contained a contract to perform the covenants of the head lease. This, which raised no privity of contract between him and the superior landlord, amounted to an implied contract of indemnity in respect of his not performing those covenants. Such an implied contract seems to arise whenever two contracts are made, and the second contract contains a stipulation to do the very thing which is undertaken to be done by the first. But to what extent does the indemnity take effect? I think it only extends to the costs of an action reasonably defended; but I think that the defendant did all that was reasonable in this case. When he was told that he might do as he chose, what was he to do? Was he to submit, and run the risk of the third party saying that he had paid too much? I think that in this case there was evidence on which the Court could find that the defendant acted reasonably, and could therefore recover these costs as damages. I do not, however, consider *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (1) to be in point. It was rightly held that there was no indemnity there, because it was not known to the defendant company that a former contract had been made, whereas in the present case there is a subsequent contract, known to the defendant, and a contract in its very terms to perform the former contract.

This first point being quite clear, it is not necessary to say anything about the second, but I will give my opinion upon it, although to me it has appeared to be a point of the utmost difficulty. Under the Rules of Court it is possible that a question may arise between a defendant and a third person, which is no question between the defendant and the plaintiff. In a clear case the third person ought not to be made a third party, but if there be a primâ facie case it is otherwise. Rule 17 assumes that there may be only one question (out of many) in common, so that if there be a plausible ground for saying that there is one single question in common the third party ought to be brought in.

(1) Law Rep. 10 Ex. 35.

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In *Benecke* v. *Frost* (1) this question was dealt with by the Court, and the Court held that questions might arise not being questions between plaintiff and defendant. It is said that the rules were made for the purpose of introducing Chancery procedure, but I think that this is too general, and that only certain parts of Chancery procedure are intended to be introduced, while in some cases what was neither Chancery nor Common Law procedure may be introduced. However this may be, it is impossible to say that the third party might with justice be ordered to pay the plaintiff's costs in the case I have supposed. Then would such an order be the subject of an appeal? Although it is only by accident that such an order could be made—for no judge would make such an order advisedly—I do not see that it could be appealed against. The third party is a party to the cause, and I do not see how Order LV. can be circumscribed or limited in the manner contended for.

I also think that a demurrer to part of the relief claimed cannot be allowed.

COTTON, L.J. I agree as to the demurrer. As to the other points, I think that the question of the application of the rule is not so complicated as has been supposed. The rules of Order XVI. are based on s. 24, sub-s. 3, of the Act of 1873, and their combined effect is that a third party, when joined as such, becomes a party to the cause with all the liabilities of a party, and one of these liabilities is the liability to pay costs under Order LV. It is said that the use of the word "rights" in sub-s. 3 of s. 24 exempts him from this liability. But I think that the rights there referred to are the rights which the third party might have to defend himself in another action. They cannot save him from the liability to costs in an action to which he is party. The object of the legislation was to make the party who had caused the litigation to pay the costs of it. As to the hypothetical case which Brett, L.J., has put of a third party being wrongly brought in because there was a primâ facie ground for bringing him in, this might be met by an appeal against the order bringing him in, after obtaining, if necessary, an

(1) 1 Q. B. D. 419.

extension of time for the purpose of appealing. I do not think the word "thenceforth" saves the third party from costs already incurred. To such costs he is undoubtedly liable. But he is not liable to costs unreasonably incurred, which would be struck off in due course of taxation.

I in no way dissent from what Brett, L.J., has said as to the liability on the contract in the lease.

Appeal dismissed.

Solicitors for defendant: *Foord & Edwards, for Dearle & Edgeworth, Eastbourne.*

Solicitors for third party: *Phillips & Son.*

J. E. H.

THE QUEEN ON THE PROSECUTION OF HER MAJESTY'S TREASURY *v.* THE MAYOR, &c., OF THE BOROUGH OF MAIDENHEAD, AND MORRIS, TREASURER OF THE BOROUGH.

Municipal Election—Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60), *s.* 22—*Expenses of Election Court—Amendment of Order—Court of Record — Certificate of Commissioners of Treasury—Rate—Mandamus.*

Upon the trial of a petition against the return of a borough councillor under the Corrupt Practices (Municipal Elections) Act, 1872, 35 & 36 Vict. c. 60, the barrister in delivering judgment said that he found the councillor guilty of personal bribery, and that all the costs of the inquiry were to be borne by him, and made an order in writing for the payment by the councillor of certain costs under s. 19 of the Act. The written order made no provision for the remuneration and allowances to the barrister and other persons under s. 22. The Lords Commissioners of the Treasury paid the amount of such remuneration and allowances and certified the payment to the borough treasurer, and required him to repay them the amount out of the borough fund or rates as provided by s. 22. A rate was accordingly made and levied. The Commissioners afterwards on receiving from the barrister a letter that he had always intended to visit all the costs upon the councillor, and had said so in giving judgment, cancelled their certificate, and the borough corporation abandoned their rate and returned the sums levied to the ratepayers. Several months later the Commissioners finding that the barrister had made no written order for the payment of the remuneration and allowances under s. 22, issued a fresh certificate requiring the borough treasurer to repay them out of the borough fund or rates, the amount of such remuneration and allowances. These facts being raised upon the return to a

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mandamus commanding the treasurer to repay the Commissioners out of the borough fund or rate, and the corporation to cause such repayment:—

Held (by Lord Coleridge, C.J., Pollock, B., and Manisty, J.), that no valid order was made by the barrister for the payment by the councillor of such remuneration and allowances under s. 22:—

Held, also (by Lord Coleridge, C.J., and Pollock, B.), that the Election Court for the trial of petitions under the Act was by virtue of s. 14, sub-s. 5, a Court of record, and that the Queen's Bench Division could not amend the barrister's order so as to make it include the payment of such remuneration and allowances:—

Held, also (by Lord Coleridge, C.J., and Pollock, B., diss. Manisty, J.), that the act of the Commissioners in certifying was a ministerial and not a judicial act, and that they had the power and were bound to make the second certificate; and were entitled to a peremptory mandamus compelling the treasurer to repay to them the amount of such remuneration and allowances out of the borough fund or rate, and compelling the corporation to order such amount to be levied by a borough rate:—

Held, (by Manisty, J.), that the Commissioners having issued a certificate and cancelled it, and caused the first rate to be returned to the rate-payers, could not issue another certificate and require a second rate to be levied; also that the Commissioners having failed to apply promptly for repayment were without remedy; also that the mandamus was bad on demurrer for not averring that the prosecutors had applied in proper time, that is in reasonable time; also that in the exercise of its discretion the Court ought to refuse a peremptory mandamus.

affirmed 9 QBD 476 CA

SPECIAL CASE stated under an order made by consent at the trial of issues of fact before Mellor, J., and a special jury. The facts contained in the special case are stated in the judgment of Pollock, B. The question for the opinion of the Court was whether the prosecutors or the defendants, or either of the defendants, were entitled to judgment, and if the prosecutors then for what amount.

If the Court should be of opinion that the Lords Commissioners of the Treasury ought wholly or in part to have been repaid, and ought now to be and can now be repaid by the Treasurer of the Borough of Maidenhead out of the borough fund or rate, the said sums, or any of them, and the defendant Morris was or is in default, and if the Court should be of opinion that the Mayor, &c., of Maidenhead could lawfully have ordered and now can lawfully order the said sums, or any of them, to be raised and levied by a rate, the verdict for the Crown was to stand for such sum as the Court should direct with costs, and judgment accordingly, and the Court was to be at liberty to order a peremptory mandamus to

issue to compel the defendant Morris to repay to the Commissioners such sum as aforesaid, after he should have received the same from a borough rate to be made and levied and to compel the Mayor, &c., to forthwith take all necessary steps to cause the said sum to be raised and collected by a rate, and to be given to Morris by him to be repaid to the Commissioners pursuant to the Act.

If the Court should be of the contrary opinion as respects the defendants, or either of them, the verdict to be set aside and entered for the defendants or such of them as the Court should direct with costs, and judgment accordingly.

1881. June 21, 24. *Sir J. Holker, Q.C.* (*A. L. Smith*, with him), for the prosecutors.

H. Matthews, Q.C. (*H. D. Greene*, with him), for the defendants.

A. L. Smith, in reply.

The arguments sufficiently appear from the judgments. In addition to the cases there cited the following were referred to: *Williams* v. *Lord Bagot* (1); *Ernest* v. *Brown* (2); *Parsons* v. *Lord Willoughby de Broke.* (3)

Cur. adv. vult.

1882. January 10. The following judgments were delivered, Lord Coleridge, C.J., saying that he concurred in the judgment of Pollock, B., but with some doubt.

MANISTY, J. This is an application for a peremptory writ of mandamus to compel the repayment by the treasurer of the borough of Maidenhead to the Lords Commissioners of the Treasury of the sum of 376*l.* 18*s.* 10*d.*, being the amount of the remuneration and allowance paid by the Commissioners to Charles James Coleman, Esq., barrister-at-law, for his services in respect of the trial of a petition against the return of one William Dawson as a town councillor of the borough on the ground of bribery, under the Corrupt Practices Municipal Elections Act, 1872 (35 & 36 Vict. c. 60), and to the officers, clerks, and short-

(1) 4 D. & R. 315. (2) 4 Bing. N. C. 162.
(3) 13 W. R. 315.

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hand writers, employed in and about the trial of that petition—and to compel the corporation to make and collect a borough rate for that purpose.

The petition was heard on several days in March, 1875, and on the 10th of that month Mr. Coleman gave judgment against Mr. Dawson; and on the following day certified to the Court of Common Pleas [at that time the court existed] that Dawson had not been duly elected and that he had been proved to have been guilty of personal bribery.

By s. 22 of the Act of 1872, it is enacted that the remuneration and allowances in question shall be paid by the Commissioners of Her Majesty's Treasury, and shall be repaid to them on their certificate, by the treasurer of the borough, out of the borough fund or rate, provided that the Court (that is the Court by which the petition is tried), may order that the whole or any part of such remuneration and allowances shall be repaid to the Commissioners by the respondent, when in the opinion of the Court he has been guilty of corrupt practices at the election.

The first question raised in this case is whether Mr. Coleman made any such order against Mr. Dawson. I am of opinion, upon the facts as found in the special case which has been stated, that no such order was made; and upon this point I concur in the judgment about to be delivered by my learned Brother Pollock, B., therefore I abstain from going further into it.

The second question is, whether, under the circumstances and upon the facts stated in the special case, the Commissioners are entitled to a peremptory writ of mandamus to compel the defendants to repay them the 376*l.* 18*s.* 10*d.* and to make a borough rate for that purpose, there being no borough fund out of which the repayment can be made.

The principal facts on which that question depends are as follows. The judgment of Mr. Coleman, as has already been observed was delivered on the 10th of March, 1875, and he made his report and certificate on the following day. It does not appear on what day the Commissioners paid the 376*l.* 18*s.* 10*d.*; but they certified the payment pursuant to the 22nd sect. of the Act, by two documents dated the 2nd and 25th of August, 1875, which are set out in the special case. The town council of the

borough, in the same month of August, made a borough rate in the nature of a county rate, of 6*d.* in the pound, for the purpose of paying the 376*l.* 18*s.* 10*d.*, and the rate was collected from the numerous persons then liable to be rated. On the 4th of October, 1875, the Commissioners revoked and cancelled their certificates of August, 1875, and wrote to the defendant Morris informing him that they had done so, stating as their reason that they had received a letter from Mr. Coleman to the effect that he had in his judgment ordered the expenses in question to be paid by the respondent Dawson. Mr. Morris thereupon returned the cancelled certificates to the Commissioners, and on the 3rd of December, 1875, the town council passed a resolution ordering the collector to return to the ratepayers respectively the sums which had been collected from them, and they were returned accordingly. At the time of making the rate there were 1472 assessments. At the time of the commencement of the present proceedings, 145 of the persons rated had left the borough, 30 had died, and the population of the borough had increased considerably. On the 9th of December, 1875, after the rate had been returned to the ratepayers, the Lords Commissioners issued a second certificate for repayment to them of the 376*l.* 18*s.* 10*d.*, and sent it to Mr. Morris with the letter of that date, which is set out in the special case. On the 20th of December, 1875, the town clerk informed the Lords Commissioners by letter, addressed to Mr. Law, that the rate had been returned, and that the town council had no fund out of which they could pay the 376*l.* 18*s.* 10*d.* No further step was taken in the matter till the 8th of June, 1876, when the Solicitor to the Treasury wrote demanding payment within a month. The money was not paid; and on the 8th of August, 1876, the Lords Commissioners applied for and obtained a rule to shew cause why a mandamus should not issue commanding the defendant Morris to repay them the 376*l.* 18*s.* 10*d.* out of the borough fund or rate, and commanding the other defendants to take all necessary steps to cause that sum to be repaid. The rule was afterwards made absolute, and on the 15th of August, 1877, a conditional mandamus was issued. The defendants made a return to the writ on the 25th of January, 1878, setting forth, among other things, the facts which I have recapitulated. The

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prosecutors pleaded, and demurred to the return; and the defendants replied, and joined in demurrer.

The issues in fact, came on for trial at Westminster, before Mellor, J., and a special jury, and in the result a verdict was entered for the Crown, subject to the opinion of this Court upon a special case, the Court to give judgment upon the demurrers as well as on the special case. I am of opinion that judgment ought to be given for the defendants on several grounds.

First, I think that the Commissioners, having issued their certificate in August, 1875, and caused a rate to be made and collected for payment of the 376*l.* 18*s.* 10*d.*, and having in October, 1875, cancelled that certificate and caused the rate to be returned to the ratepayers, could not legally issue another certificate in December, 1875, and cause another rate to be made and collected.

Making a rate, and collecting it from, and afterwards returning it to, each of upwards of 1400 ratepayers is a very costly proceeding; and I know of no law by which the ratepayers can be subjected to the cost of making a second rate. Moreover, the ratepayers are a fluctuating body, and if payment of a second rate is enforced, then several ratepayers who were liable to contribute and did contribute to the payment of the sum in question will be exempted from contributing anything towards it, and others who were not liable will be made to contribute to the payment of it. Surely this would be unjust. In the case of an ordinary execution against the goods of a judgment-debtor, followed by a levy and sale by the sheriff, I suppose it would not be contended that the judgment-creditor could issue a second execution and cause a second levy and sale to be made for the same debt, he having, owing to some mistaken notion on his part caused the sheriff to return the proceeds of the first levy. If he could not do so, I am at a loss to understand upon what principle the Lords of the Treasury can be entitled to issue a second certificate and require a second borough rate to be levied in the present case. Suppose it had been—and for aught that appears to the contrary it may have been—necessary to enforce payment of the first rate by distress and sale of the goods belonging to some of the numerous ratepayers, could they have been subjected,

legally, to a second distress and sale for a second rate made for the same purpose as the first? I venture to think they could not. If not, why should those who paid the first rate without a distress be subjected to the payment of the second rate? Surely the second rate must be valid and enforceable against all or none of the ratepayers. Whether an execution-creditor under the supposed circumstances to which I have adverted, or whether the Lords of the Treasury under the circumstances of the present case, could have compelled the persons to whom the money raised by means of the first rate was repaid to refund it on the ground that it was repaid to them under a mistake of fact, it is unnecessary to consider. For the reasons I have given, I think a second rate would be illegal.

Secondly, I am of opinion that the Lords Commissioners were bound to apply promptly for repayment of the money, that they failed to do so, and that consequently they are without remedy. A borough rate made pursuant to s. 92 of the Municipal Corporations Reform Act, 1835, must be prospective. A rate in the nature of a borough rate made pursuant to s. 22 of the Corrupt Practices Municipal Corporations Act, 1872, may, because it must, be retrospective; nevertheless, in my opinion, it must be made promptly so as to throw the burden as near as is reasonably possible upon those who ought to bear it. Now, in the present case, the judgment which rendered the ratepayers liable to pay the 376*l.* 18*s.* 10*d.* was delivered on the 10th of March, 1875, and it was not till the 9th of December, 1875, that the Lords Commissioners made their second certificate or order now sought to be enforced, and it was not until the 8th of August, 1876, that they applied for a mandamus. I think they were too late in taking both these steps, see *Reg.* v. *Wigan.* (1)

Thirdly, I am of opinion that the mandamus which has been issued is bad on the face of it for want of an averment that the prosecutors applied in proper time, that is in reasonable time, see *Reg.* v. *Wigan* (2), in which Lord Coleridge, then L.C.J. of the Common Pleas, delivering the considered judgment of the Exchequer Chamber said, "If their not coming in a reasonable time

(1) Law Rep. 9 Q. B. 317, 326, in the Ex. Ch., and 1 App. Cas. 611.
(2) Law Rep. 9 Q. B. 326.

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causes the Commissioners to lose their right, their coming in a reasonable time is a step in their title to the remedy, and whether they have come in a reasonable time or not is a question of fact, and this mandamus is bad for not averring that they had come in a reasonable time." If such an averment had been made in the present case it would doubtless have been traversed, and the jury would in my opinion have been justified in finding the issue in favour of the defendants.

For these reasons I am of opinion that, in point of law, the prosecutors are not entitled to the peremptory mandamus which they ask for. Lastly, I am of opinion that upon the facts found the Court ought, in the exercise of its discretion, to refuse to grant a peremptory mandamus.

Q.B.D. 500

POLLOCK, B. The question in this case arises between the parties upon facts found in a special case stated for the opinion of this Court pursuant to an order made by Mellor, J., at the trial before him in March, 1879, of the issues in fact arising upon a mandamus granted upon the application of the Lords of the Treasury, to enforce the payment by the defendants of the sum of 376*l.* 18*s.* 10*d.*, being the amount of the remuneration and allowances paid by the prosecutors as Commissioners of Her Majesty's Treasury to the barrister, officers, clerks, and shorthand writers employed under the provisions of the Corrupt Practices Municipal Elections Act, 1872, for the trial of an election petition which took place in March, 1875. The material facts, which are contained in the special case and the appendix thereto, are as follows:—

A petition having been presented against the return of three town councillors of the borough of Maidenhead, it was tried before Mr. Coleman, the barrister duly appointed under the provisions of the Corrupt Practices Municipal Elections Act, 1872, in March, 1875. The inquiry lasted for nine days, during which expenses were properly incurred for providing accommodation for holding and receiving the Election Court, and also for the payment of the barrister, his registrar and clerk, a shorthand writer, and for fees due to the Master of the Court of Common Pleas. On the 11th of March, 1875, the barrister made an order under s. 19 of the said

Act, directingt hat the costs, charges, and expenses of the petition and proceedings in Court by the parties thereto should be paid by the respondents in equal shares. With respect, however, to the expenses of the Court, which are provided for by s. 22, and which form the subject-matter of our decision, no order was then made by the barrister, although, as appears by a letter subsequently written by him, to which I shall have occasion to refer, it was his intention to visit upon one of the respondents these costs, and he expressed this intention orally in giving judgment upon the case.

The expenses of the Court being thus unprovided for, the Commissioners of the Treasury paid them to the barrister and other persons entitled, and by two certificates dated respectively the 2nd and 25th of August, 1875, they certified to the defendant Morris, as treasurer of the borough of Maidenhead, that such payments had been made, and required him as such treasurer to repay to them the amount thereof out of the borough fund or rates. At this time the borough fund was overdrawn to a large amount, and no property was then or since available to meet the demand. On the 6th of August, 1875, a borough rate at 6*d.* in the pound was made to meet the claim, and this was collected from persons liable to be rated in the borough.

Subsequently to this a correspondence took place between the Commissioners of the Treasury and Mr. Morris as town clerk, whence it appears that the attention of the Commissioners of the Treasury was called to the judgment delivered by the barrister at the close of the petition, which declared the respondent guilty of personal bribery, and ordered him to pay the costs of the inquiry; and thereupon the Commissioners communicated with the barrister, who, on the 27th of September, wrote in reply that it had always been his intention to visit upon Mr. Dawson, the respondent, the costs relating to and belonging to the inquiry, and that he had said so in giving judgment. On receipt of this letter, the Commissioners withdrew their two orders upon the defendant for repayment of the sums which they had advanced, and instructed their solicitors to proceed against the respondent Dawson for the amount. Before, however, these proceedings commenced, the Commissioners received from the prescribed officer under the Act

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a copy of an order made by Mr. Coleman, dated the 4th of October, 1875, in the following terms:—

"Having upon the hearing of the petition found the respondent, William Dawson, personally guilty of corrupt practices at the election, I do order that the said respondent, William Dawson, do pay to the town clerk the expenses incurred by him for receiving the Court under the provisions of the above-mentioned Act."

On the 9th of December, 1875, the Commissioners wrote to the defendant Morris calling his attention to the fact that the order related solely to the expenses incurred by the town clerk in receiving the Court under s. 20, and made no mention of the sums advanced by the Commissioners under s. 22, and stating that they were advised that even if it was the intention of the barrister that the whole costs of the inquiry should be borne by the respondent, it was not then competent to him to make such an order, inasmuch as he was functus officio, and that the remuneration and allowances under s. 22, must be borne by the treasurer of the borough. In reply to this, on the 20th of December, the town clerk wrote to the Commissioners stating that upon the withdrawal of their first order the town council had abandoned the rate, and had ordered the sums collected to be returned to the ratepayers, which had been done. On the 8th of June, 1876, the Commissioners of the Treasury issued a fresh certificate by which they required the treasurer of the borough to repay out of the borough fund or rates within fourteen days, the sums advanced by them for the costs in question; and this amount not being paid they applied to this Court for a mandamus ordering the defendants to pay it forthwith. The defendants in their return to this mandamus set forth the above facts, and, issues both in law and fact having been joined, the case came on for trial before Mellor, J.

At the trial evidence was tendered on behalf of the defendants in addition to the documents herein referred to, to shew that the barrister did in delivering judgment on the 10th of March, 1875, orally order that the expenses of receiving the Court and also the allowances, remunerations, and expenses to be paid to the barrister for his services in respect of the trial of the said petition,

and to the officers and clerks and others employed under the provisions of the Act should be borne and paid by the said William Dawson, and should be repaid to the said Lords Commissioners by him, and not by the defendants. The said evidence was objected to on the part of the prosecution, but was admitted by the learned judge subject to such objection. Oral evidence was thereupon given both by the prosecutors and by the defendants. The question of the admissibility of this oral evidence was reserved for the opinion of this Court.

On behalf of the defendants, it was further sought to put in as evidence a letter written by Mr. Coleman to the Commissioners. On objection being made by the prosecution to the reception of the same, the learned judge ruled that it was inadmissible, and it was accordingly excluded. The letter was, however, inserted by consent in the special case, but subject to the question of its admissibility, and if admissible for any purpose it is to be among the facts submitted to the consideration of this Court. It is as follows:—

"Redcar, Yorkshire,
"September 27, 1875.

"Sir,—I have the honour to acknowledge the receipt of your letter 14,422. It was always my intention to visit upon Mr. Dawson, the costs relating and belonging to the inquiry. I said so in giving judgment.

"Dawson was proved to have been guilty to my satisfaction of personal bribery, and I thought the ratepayers of Maidenhead ought not to be asked to pay the expenses of an inquiry brought about by reason of his having done so.

"Mr. Lush, my registrar, is now in London, and will take any further steps, if any, which may be required in the matter,

"I have the honour to remain, Sir,
"Your most obedient servant,
"Charles J. Coleman.

"William Law, Esq."

At the conclusion of the trial, the learned judge left the following question to the jury:—

"Was there a direction that those costs which are included in and are incident to the inquiry, namely, the remuneration, costs

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of the judge, officers, and so on, as well as the town clerk's costs, should be paid by Mr. Dawson?"

To this question the jury returned answer as follows:—

"The jury is of opinion that there is sufficient evidence that Mr. Coleman did order the whole of the costs to be paid by Mr. Dawson, and not by the borough of Maidenhead."

The learned judge, however, directed that a verdict should be entered for the Crown for damages 376*l.* 18*s.* 10*d.* and 40*s.* costs, subject to the opinion of the Court upon a special case, it being agreed that the Court should give judgment, upon the demurrers raised on the pleadings as well as on the special case.

These being the facts before us, the substantial question for our determination is, whether the plaintiffs, who as Commissioners of the Treasury, have paid the sum in question as expenses of the barrister's court, are now entitled to claim repayment thereof by the defendants and to a mandamus requiring them to levy the amount by a borough rate? In my judgment they are so entitled, and, moreover, I see nothing which ought to prevent the Court in the exercise of its discretion making an order for the mandamus.

As some confusion or misapprehension appears to have arisen during the proceedings with reference to the nature of these particular expenses, it may be convenient to state shortly how the question of costs and expenses is dealt with by the Corrupt Practices (Municipal Elections) Act, 1872.

Under this Act three classes of costs are contemplated, namely: 1. The costs of the petition and proceedings consequent thereon, which may be called the costs inter partes. These are dealt with by s. 19, which provides that they shall be defrayed by the parties to the petition in such manner and in such proportions as the Court by which the petition is tried may determine. 2. The expenses of the reception and holding of the Court upon the trial of a petition. These are dealt with by s. 20, and are to be paid by the treasurer of the borough out of the borough fund or rate. 3. The remuneration and allowances to be paid to the barrister and to any officers, clerks, or shorthand writers employed under the provisions of the Act. These are to be paid by the Commissioners of the Treasury, and are to be repaid to them on their

certificate by the treasurer of the borough to which the petition relates out of the borough fund or rate. This section, however, contains a provision that the Court, at its discretion, may order that the whole or any part of such remuneration and allowances, or the whole or part of the expenses incurred by the town clerk for receiving the Court, shall be repaid to the commissioners or to the town clerk, under certain circumstances, by the petitioner or by the respondent, and that any order so made for the repayment of any sum by a petitioner or respondent may be enforced in the same way as an order for payment of costs.

The expenses with which we have to do in the present case are these last, which are payable under s. 22; and the contention of the plaintiffs is, that they having paid them under the provisions of this section, and no order having been made by the Court for the repayment by either the petitioner or the respondent to the plaintiffs, under those provisions, they, the plaintiffs, are entitled to be repaid by the defendant as treasurer of the borough, out of the borough fund or rate. On the part of the defendants it was contended that the verbal expression of opinion by the barrister at the hearing of the petition must be taken to amount to an order within the meaning of s. 22; or, failing this, that the order made by the barrister on the 4th of October, 1875, was a valid order upon the respondent, and therefore that he, and not the defendants, was liable to the plaintiffs. As to the first of these two questions, the defendants are entitled to the benefit of the answer given by the jury at the trial, that there was sufficient evidence that the barrister did order the whole costs to be paid by Mr. Dawson. This finding, however, must be taken, subject to the facts which are now before us, as stated in the special case, and it does not appear to me to amount to more than a finding that the barrister, as stated in his letter of the 27th of September, 1875, had the intention to visit upon Mr. Dawson the costs in question, and that he said so in giving judgment, and we have it as a fact that on the 11th of March, at the close of the inquiry, the barrister did make an order in writing under s. 19, directing that the costs of the petition and proceedings, which I have called the costs inter partes, should be paid by the respondent, but wholly omitting to deal with the expenses provided for by s. 22. Upon

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reference to s. 14 of the Municipal Act of 1872, subs. 5, it will be found that the election court, for the trial of petitions under that Act, has all the powers and privileges which a judge may have on the trial of an election petition under the provisions of the Parliamentary Elections Act, 1868; and, by s. 29 of this Act, the judge on the trial of an election petition has the same powers, jurisdiction, and authority as a judge of one of the superior Courts, and as a judge of assize and nisi prius, and the Court held by him shall be a court of record. Under these circumstances, it seems to me clear that the court of a barrister appointed to try a municipal election petition is a court of record, and this being so, the acts of the Court can only be proved by record. If any authorities are needed for this latter proposition, they will be found in the cases of *Ex parte Fernandez* (1), and *Kemp* v. *Neville*. (2) In looking, therefore, to see what was the order made by the Court at the time of the trial, the matter must be governed not by what he intended or said, but by the written order actually made, and which clearly did not include the costs in question.

The defendants, however, next contended that even if it were admitted that no sufficient order was made by the barrister at the hearing of the petition, the order made by him subsequently, upon the 4th of October, was a valid and a sufficient order; or, that if this be not so, that the letter written by the barrister upon the 27th of September, 1875, must be taken to be a sufficient expression of his intention to visit upon Mr. Dawson, the respondent, the costs relating and belonging to the inquiry, to enable this Court to amend the record of what passed at the hearing of the petition. As to the first of these contentions, I think it is sufficient to say that the order dated the 4th of October, 1875, in no way deals, or professes to deal, with the costs incurred under s. 22, which alone are in question in this case. The costs with which it does profess to deal are the expenses incurred by the town clerk for receiving the Court, which are provided for by s. 20. So far from assisting the defendants, this later order has a contrary effect. By a clear expression of opinion confined to

(1) 10 C. B. (N.S.) 3; 30 L. J. (C.P.) 321.

(2) 10 C. B. (N.S.) 523; 31 L. J. (C.P.) 158.

the expenses for receiving the Court under s. 20, it excludes the idea that the barrister intended to make any order dealing with the costs of remuneration to himself, the officers, and shorthand writer under s. 22.

With regard to the second contention, there is no doubt but that a mistake made by the clerk or officer of a court in entering a verdict or judgment may be amended from the judge's notes. The older authorities are referred to in Com. Dig. Amendment P., and in *Marianski* v. *Cairns* (1), where the finding of issues at a trial had been entered imperfectly and the House sent the case back to have the verdict entered according to the substance of the finding with the assistance of the judge, who would be guided by his notes. It is to be observed, however, that this course was so adopted expressly upon the ground that what occurred amounted to a mere mis-entry of the verdict.

In the present case the written order made at the trial was signed by the barrister himself. This does not include the expenses in question, although it does include other costs, namely, those inter partes. Subsequently, on the 4th of October, the barrister made another order as to costs under s. 20. He has never made any order as to costs under s. 22, nor does it appear that any application has been made to him at any time to amend or vary either of these two orders, but it is contended that we ought now to do so by reason of the barrister having on the 27th of September, between the date of the two orders, written a letter to the Commissioners of the Treasury wherein he uses these very general words, "It was always my intention to visit upon Mr. Dawson the costs relating and belonging to the inquiry. I said so in giving judgment."

For us to amend by this mere expression of intention, which is contrary to the two written orders signed by the barrister, appears to me to be not only without precedent, but it goes to destroy the very wholesome rule that the judgments and proceedings of a court of record must be proved by the record. For a judge to amend his own record, or for a Court before which that record comes to amend it so as to be in accordance with the judge's notes, is reasonable and intelligible, but for another Court to

(1) 1 Macq. H. L., Sc. 212, 766.

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amend a record upon the suggestion of a judge's intention, expressed by a mere letter, which is not written in consequence of an application made by one of the parties to the proceeding, nor indeed written to either of the parties, or those who represent them, would lead to consequences tending to produce the greatest uncertainty and inconvenience.

It was further contended by the defendants that the two certificates made by the prosecutors, and dated respectively the 2nd and 25th of August, 1875, having been cancelled and the money collected under the rate made for the repayment of the sums mentioned in those two certificates having been repaid to the ratepayers, the prosecutors had no authority to make the second certificate dated the 9th of September, 1875, requiring the defendant, William Morris, to pay the amount out of the borough fund; and further, that such second order would be bad, because it would make the rate levied under it retrospective, and would have the effect of visiting upon the ratepayers who existed at the date of the second order a payment which ought to have fallen upon those who were ratepayers at the date of the first certificate. These objections were presented to us, first, as matters of strict law, and, secondly, as appeals to that discretion which we are entitled to exercise in considering whether we ought to allow the mandamus which is asked for to go.

It might well be doubted whether this discretion ought to be exercised at this stage of the proceedings, and whether, in accordance with the true practice of the Court, this point ought not to have been taken when the rule nisi for the mandamus was moved. Our attention, however, was called during the argument to what passed upon that occasion, and this satisfied me that when the rule was granted it was intended by the Court, and so expressed by the Judges, that the question of discretion, as well as the question of legal right, should be open to the defendants upon the final argument.

It appears to me, however, that neither of these points assist the defendants. With regard to the latter point, namely, the illegality or injustice of giving effect to a retrospective rate, there is no doubt that where a rate is made under the provisions contained in s. 92 of the Municipal Corporation Act, 5 & 6 Will. 4,

c. 76, it ought not to be retrospective. This result, however, has been arrived at upon the consideration of the particular language of that section, which contains words which are in their nature prospective only, as will be seen by reference to the case of *Woods* v. *Reed*. (1) With respect to a borough rate made for the purpose of complying with the provisions of ss. 20 and 22 of the Municipal Act of 1872, by providing for the costs of receiving the Election Court and repaying to the Commissioners of the Treasury what has been paid by them to the barrister, officers, clerks, and shorthand writers, it is obvious that the rate made in such a case must be retrospective. No such rate could be made until the expenses had been incurred; nor would it be possible, even if the statute permitted such a course, to contemplate beforehand what would be the amount of such expenses, or indeed that they ever would be incurred at all.

With reference to the objection that the plaintiffs having once made their first certificate were functi officio, and therefore had no power to make a second, I think the argument might possibly be met by saying that the prosecutors having made their first certificate were then functi officio, and had no power to cancel it, in which case the first certificate would stand good, and the second would be of no effect. I should prefer, myself, however, to base my judgment upon a broader ground, and to say that the act of giving this certificate is a ministerial and not a judicial act, and therefore that no question of estoppel can arise, and that if any misapprehension arose whereby the prosecutors were misled either in giving or in cancelling the first certificate, it was not only open to them to make the second certificate, but they were bound to do so in order to carry out what is their duty under the provisions of the statute. For the same reasons, I am at a loss to see why any discretion possessed by the Court should be exercised in favour of the defendants. The matter seems to me to stand thus. The expenses in question must have been and were properly incurred; when incurred, they are to be paid, and have been paid by the prosecutors, and s. 22 of the statute contains a provision in the clearest language that they should be repaid by

(1) 2 M. & W. 777.

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the defendants. The same section, however, provides that the Court may order that they are to be repaid to the prosecutors by the petitioner or respondent. The onus of proving such an order rests on the defendants, and they having failed to produce or prove any such order, they are not in my judgment entitled to any relief at our hands.

To give effect to this argument, would produce this result, that no valid order having been made by the barrister upon the respondent, the prosecutors could not obtain repayment from him, and therefore the amount which they have properly paid would fall upon the public funds, a state of things which clearly was never contemplated under any circumstances. I think, therefore, that our judgment should be for the prosecutors, and that the verdict entered for the Crown at the trial should stand for the full amount, and that a peremptory mandamus should issue to compel the defendant Morris to repay this amount after he has received it from a borough rate; and to compel the mayor, bridge masters, and burgesses, and the town council of the borough of Maidenhead to take steps to cause the said sum to be collected by means of a borough rate.

Judgment for the prosecutors for 376*l.* 18*s.* 10*d.*, *and for a peremptory mandamus.*

Solicitors for prosecutors: *Hare & Fell.*
Solicitor for defendants: *Mander.*

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Damages—Breach of Contract—Cost of Performance not the Measure of.

The grantees of certain land had covenanted with the grantor, since deceased, that the land, except as to the entrance to be made by them towards an intended new road, should be and be kept enclosed on all the sides abutting on the land of the grantor with a brick wall seven feet high. The grantees not having erected a wall in pursuance of the covenant, an action was brought against them by the executors and devisees of the grantor for damages for the breach of covenant.

It appeared that, in the events that had happened, the value of the adjoining land of the plaintiffs was not decreased by the non-erection of the wall to anything like the amount which it would have cost to build the wall:—

Held, that, the true measure of damages being the pecuniary amount of the difference between the position of the plaintiffs upon the breach of contract and what it would have been if the contract had been performed, under the circumstances of the case the amount that it would cost to build the wall was not the correct measure of the damages.

RULE to set aside the verdict of a jury on a writ of inquiry as to the amount of damages in the action. The facts of the case sufficiently appear from the judgment.

Dec. 15. *Wills, Q.C.*, and *F. Turner*, for the plaintiffs, shewed cause. It is not necessary to contend that the cost of erecting the wall is the absolute test of the damages, and the assessment of damages may be supported without going to that length. There was evidence to shew that the plaintiffs could not exercise their right of pre-emption by reason of the absence of the wall, and that the damage sustained in consequence was equal in value to the amount that would have been expended in building the wall. But, however this may be, the cost of erecting the wall must be an element for the jury to consider in estimating the amount of the damages, though, perhaps, not per se a conclusive and absolute test, and therefore the undersheriff was right in not withdrawing that matter from the jury. It is to be observed that the jury did not give the amount which it was proved that the wall would have cost. It cannot be taken therefore that they acted on the evidence of the cost of the wall, or, at any rate that they acted on that evidence alone and made that the sole test.

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Secondly, even assuming that they did make the cost of the wall the measure of damages, the authorities are in favour of the view that the test thus adopted is the correct one.

[The authorities they cited are referred to in the judgment.]

Crump, for the defendants, supported the rule. The cost of the erection of the wall cannot be the true measure of damages. The measure of damages is what the plaintiffs have lost pecuniarily by the nonperformance of the contract. Equity in certain circumstances, and where damages are no adequate remedy, will compel specific performance, but in an action for damages in which pecuniary compensation is the remedy sought, the measure of the damages must be the difference pecuniarily estimated between what the plaintiff's position would have been if the contract had been fulfilled and his existing position. Of this the cost of the wall cannot in the present case be a test. In some cases it may be that the two tests will coincide, and then possibly it may be unobjectionable to make the amount which it would have cost to execute the contract the test. That is not so in the present case.

Cur. adv. vult.

Jan. 26. The judgment of the Court (Field and Cavé, JJ.), was delivered by

FIELD, J. This was a rule obtained by Mr. Crump, on the part of the defendants, calling upon the plaintiffs to shew cause why the assessment by a jury of the sum of 750*l.* as damages under a writ of inquiry should not be set aside and a new inquiry had.

Mr. Crump originally moved in this division for a rule on the ground of misdirection as well as of excessive damages, but the Court refused the rule on the former ground, apparently entertaining the view that in the question of damages (upon which they granted the rule which came on before us) was also involved the question of misdirection. Upon this refusal, Mr. Crump moved in the Court of Appeal for a rule upon this ground also, and the Court granted it, but postponed the argument until the rule in this Division had been decided, so that the Appeal Court might have both rules before it in the event of an appeal, and

the matter stood in this position when the rule nisi in this division came on for argument.

It appeared, however, to us to be not free from difficulty to be called upon to decide whether the damages were excessive, unless the direction under which they were assessed was also before us so as to enable us to say whether it was right, or, if not, what it ought to have been. We thought it possible that the vice, if any, might be in the direction and not in the amount of damages, which might be correct, assuming the direction to be correct, and upon our suggestion therefore the rule to shew cause in this division was amended so as to include both grounds, and upon that footing the case was argued. It is one of a somewhat unusual character, and involves questions as to the principle upon which damages ought to be assessed, few questions upon which point are free from difficulty.

The action was brought by the executors and devisees in trust and the parties beneficially interested under the will of Col. Wigsell, for the breach of a covenant entered into by the defendants with him in a conveyance to them of twelve acres of land, dated the 7th of February, 1872. The land thus conveyed was nearly triangular in shape. Its eastern side abutted on a public road until it reached the apex of the triangle; its western side adjoined other property of Col. Wigsell, and along this western side a new road was intended to be made, giving to the conveyed property an access to the nearest station of the Brighton Railway; and the base of the triangle ran along a strip of ground belonging to Col. Wigsell extending up to the railway. The estate of Col. Wigsell (which thus surrounded the whole plot) was a very extensive one, although not more than about twenty acres of it (if any) admittedly could be injuriously affected by the breach of covenant complained of.

The purchase-money was 2576*l.*, equal to nearly 215*l.* an acre, and the deed contained the following proviso and covenant upon which the whole question argued turned:—

1st. A proviso that if the defendants should not require the land for a blind school or asylum, and should within ten years, after the 11th of August, 1871, desire to sell the whole or any part which they should not so require, Col. Wigsell, his heirs or

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assigns, should have a right of pre-emption of the land at 2063*l.* 11*s.* for the whole, or 166*l.* 13*s.* 4*d.* per acre for any less quantity.

2nd. A covenant by the defendants that the land, except as to the entrance to be made by them towards the intended new road to the railway station, "should be and be kept enclosed on all the sides abutting on the land belonging to Col. Wigsell with a brick wall or iron railing seven feet high."

It was for the breach by the defendants of this covenant, in never having enclosed their land with a wall or railing, that the action was brought.

The circumstances under which the defendants committed this breach of covenant were as follows:—

In 1878 they decided not to use the land or any part of it by building their projected asylum, and they acted upon the proviso for pre-emption by offering the estate to Col. Wigsell's executors in its then condition, i.e. of course without any enclosure by wall or railing, but the executors declined to buy back, alleging the non-existence of the enclosure as their reason, and also required the defendants to make the enclosure of the land in one or other of the prescribed modes; but this the defendants refused to do, contending that, as they had determined not to use the land for an asylum, their obligation to enclose it did not arise, the covenant, as they alleged, being dependent on such use of the land.

Thereupon the action was brought, and the defendants having alternatively paid 40*s.* into court by way of damages, a special case was stated by consent.

In this case the plaintiffs claimed the right to recover damages, and that the measure of such damages was the sum it would cost to erect the wall or fence, and one of the questions stated for the opinion of the Court in the case was, "Whether the plaintiffs were entitled to such damages, and if not, upon what principle the damages should be assessed."

Upon the argument of the case before Kelly, C.B., and Huddleston, B., the Court held that the covenant to enclose was an independent one, and that a breach had been committed for which the defendants were liable in the action, and, inasmuch as by the form of the alternative stated in the case, the plaintiffs in

that event became entitled to judgment, the Court gave it to them and declined to give any judgment upon the question of damages. The Lord Chief Baron, indeed, expressed a very decided opinion that the damages in point of principle would be the amount which it would cost to erect the wall; but Baron Huddleston confined his judgment to the point of liability, although he indicated a direction to the jury which, as he said, was in very vague terms, but was based upon the deterioration of the interest of the plaintiffs, under which, he said, it might be that a jury might arrive at the conclusion that the amount of damages might be the value of the wall, upon which, however, he said nothing.

The plaintiffs, having thus obtained judgment, issued a writ of inquiry to assess the damages. Upon the execution of the writ of inquiry, Mr. Wills, for the plaintiffs, claimed his damages under three alternative heads.

1st. The sum which the wall or fence would cost.

2ndly. The damage resulting from the non-exercise of the option to buy back, which he said was due to the absence of the fence; and

3rdly. Damage to the adjoining or neighbouring twenty acres.

Upon the first head he gave evidence, which was undisputed, to the effect that the cost of the wall with necessary piers would be from 1149*l.* to 1199*l.* He also gave evidence of the cost of the alternative iron railing which his witnesses put at, without a dwarf wall, 3013*l.*, and if erected upon a dwarf wall two feet high, 1980*l.*, including cost of wall. Mr. Wills did not however claim damages upon the alternative of the iron railing as he properly assumed against himself the least expensive mode in which the defendants could have performed the covenant. Upon the first head of damage the undersheriff directed the jury thus:—"The plaintiffs say it would cost 1000*l.* to build a wall, the covenant is that they shall build a wall or put an iron railing 2000*l.* more expensive," but "you are to say what damages they are to receive for the non-fulfilment of that covenant," and that was all he said.

In support of the second head of damage Mr. Wills called one of the executors and devisees in trust, who stated that the trustees

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in declining to buy were influenced by the fact that the wall was not built, their opinion being that the land in its then state was somewhat of a speculative bargain, which, as trustees, it was hardly worth their while to undertake, but that "if the wall had been built they should have no hesitation about it." This gentleman, and also the plaintiffs' other witnesses, stated that, by the necessary loss of the exercise of this option to have the land back with the wall built upon it, they had sustained damage to the amount which would be expended in building the wall. The undersheriff, in his direction to the jury upon this head, told them that the question "for them was, have the plaintiffs sustained any damage by reason of the wall not being built so that they have not had the full advantage which they might have of repurchasing the land."

The third head of damage was not disputed by the defendants in principle. As to the extent of it, however, a great body of evidence was gone into on one side and the other, the plaintiffs' witnesses alleging that the damage amounted, according to one witness, to 50*l.*, and, according to another, nearly 100*l.* per acre, i.e., 1000*l.* or 2000*l.* as the case may be; the defendants' witnesses, on the contrary, alleging that the existence of a blank brick wall seven feet high enclosing twelve acres of land surrounded by undeveloped building land would have been the reverse of an advantage, and putting the damages as nominal.

No substantial complaint was made of the direction of the undersheriff on this head of damage.

Now as the jury were not asked to say on which of the heads of damage claimed they based their verdict of 750*l.*, and as the amount is less by 450*l.* than the cost of the wall (which amount was not in dispute), it is difficult to assign their verdict to that or even the second head in which the same amount was involved without any alternative sum, and the probability would seem to be that they acted upon the third principle as to which there is no substantial complaint of misdirection. This, however, is uncertain, as their verdict is reconcileable with their having acted under either of the first two heads, taking upon themselves to reduce the amount. It is, however, unnecessary for the purpose of the present rule to speculate upon this, for upon the assumption

that the verdict was based upon the third head, and that alone, we have come to the conclusion that upon a correct view of the evidence the amount is excessive.

Looking at the position of the plot of land in question, and the grounds upon which the surveyors for the plaintiffs based their estimate of the injury alleged to have been sustained by the adjoining twenty acres, we cannot come to the conclusion that a loss at all approaching 750*l.* has been sustained. It is not of course for us to say what sum would be sufficient, or whether any loss has been sustained beyond the 40*s.* paid into court; that is the province of the jury, to which the case will have to be submitted.

But the view we take upon this part of the case is not sufficient of itself to make the rule absolute for a new trial, because it may be that the verdict may have been given or is capable of being supported by one or both of the other two principles enunciated, and it is necessary therefore to take them into consideration.

But, with regard to the second head of damage contended for, we also consider the damages excessive.

No data whatever were given for assuming the damage to be equal to the cost of the wall, and we know of no authority for saying that evidence of such damage is admissible at all, whilst upon principle it seems to us to be too remote.

The first head of damage, however, was very strongly contended for by Mr. Wills, who cited many authorities in support of it, but we are of opinion that it cannot be supported.

It must be remembered that remedies for a breach of contract such as this are of two kinds.

First, the plaintiffs, if they really wished to have the wall built in accordance with the contract, so that they might have the very thing contracted for, and nothing else, might have claimed in the Chancery Division specific performance of the covenant, and in that event, if the Court had come to the conclusion that the damages to be recovered in an action for damages, upon the principles applicable to such actions, would not adequately protect the plaintiffs' rights and interest, it might have ordered the defendants to build the wall, and so no question could have arisen as to

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the extent or otherwise of any injury sustained by the plaintiffs from the absence of it. But it was also open to the plaintiffs to do what they have done, viz., bring this action for damages, in which event they will be under no obligation whatever to expend the amount recovered in erecting the wall, and most probably would never think for a moment of any such expenditure, which to us, at least, would seem a simple waste of the money.

The effect, however, of electing to bring the action for damages, is to convert the right to the performance of the contract into a right to have compensation in money, and the rule in such a case, stated in its most general terms, is that the plaintiff is entitled to have his damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed: per Parke, B., in *Robinson* v. *Harman* (1), adopted in *Lock* v. *Furze*. (2)

In the present case the only difference between the two states is that twenty acres of the plaintiffs' land are said to be of less value than they would have been if the wall had been built, and for that difference, whatever it may be, the defendants admit that they are liable. But in what way does the cost of the wall or fence become the measure of that difference? If it had been oak paling the damages would have been less, although such a fence is equally effective for the purposes of the contract; if the fence had been limited by the contract to the alternative iron railing, the damages would have been 3015*l*., equal nearly to the fee simple value of the twenty acres at the price at which the plaintiffs were entitled to buy the twelve acres back. The element of cost to the defendants, which may thus vary, cannot be the measure of the difference to the plaintiffs, which is one thing—it represents in no sense that difference. Upon principle, therefore, such a basis of assessment seems to us inadmissible, and it must next be seen if it can be supported upon authority.

The case which was most relied upon by Mr. Wills for this purpose was that of *Pell* v. *Shearman* (3), and which, at first sight, has the air of supporting his contention.

(1) 1 Ex. 855. (2) Law Rep. 1 C. P. 441.
(3) 10 Ex. 766.

In that case the defendants had covenanted that they would, in land to be, and which was, afterwards demised to them, sink a pit to the lower vein of coal (supposed to lie under the surface) or to a depth of 130 yards in search of that vein, and if a marketable vein of coal should be reached would pay to Couch (the plaintiff being his assignee in insolvency) 250*l.* and 2000*l.*, and the action was brought for a breach of this covenant, the special damage alleged being the loss of the chance of finding the coal, and thus entitling the insolvent to the two sums of 250*l.* and 2000*l.* There was evidence at the trial that if the pit had been sunk to 130 yards a marketable vein of coal might have been reached, and that the cost of sinking would be 2600*l.* The defendants, admitting the breach, submitted that the plaintiff was only entitled to nominal damages, but Maule, J., directed the jury that as the defendants had failed to perform a work which the plaintiffs had a right to have done at their cost, and which might have produced him 2500*l.*, the jury ought to estimate the damage either with reference to the cost of sinking the pit, or give the amount which might become payable. Upon this direction the jury gave a verdict for the plaintiff for 2500*l.* (probably an error for 2250*l.*), and leave for that purpose having been reserved at the trial, the defendant moved to enter the verdict for nominal damages or for a new trial, on the ground of misdirection in leaving the cost of the work to the jury, contending that the judge ought simply to have left it to the jury to estimate the value of the contingency. Upon the argument of the rule the plaintiff's counsel urged that the defendants were bound either to do the work or pay as damages what it would cost. Upon which Parke, B., is reported to have said, "In this case there is difficulty in making the cost of sinking the pit the measure of damage, because the plaintiff cannot go upon the land and make the pit. If he had been the owner of the soil, the criterion of damage would have been the expense of putting him in the same situation as if the defendants had performed their contract; and then he would only have had to spend the money in sinking the pit." The defendants, on the other hand, claimed that only nominal damages could be recovered. All the members of the Court, however, were of opinion that the

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plaintiff was entitled to more than nominal damages, but they thought that the branch of the learned judge's direction to the jury which left to them the loss of the chance of finding marketable coal was correct, and so the verdict might be and was supported.

Parke, B., again pointed out that the expense was a wrong criterion of damage, but also again putting his opinion not upon any general footing, but upon the limited ground that the plaintiff had no right to go upon the defendants' land so as to be able to perform the covenant. Now, in fact, the very same element exists in the present case, so that as far as the dictum of Parke, B., in that case went it is an authority against the present plaintiffs. But Mr. Wills sought to avoid the distinction taken by Parke, B., by saying that the plaintiffs were willing to waive the ground of it, and as it were to throw in the land by simply taking the cost of the wall as damages as if erected on their land, but we do not see how such a suggestion can alter the principle of damage. His principal contention upon this case, however, was that Parke, B., by putting his view upon the limited ground must be considered as having entertained the opinion that but for that the cost of sinking the pit might have been the measure of damage, and that he seems, indeed, if correctly reported, to have expressed such an opinion. But however this may be, the reason of the decision in *Pell* v. *Shearman* (1) rested upon the other branch of the alternative left to the jury, and the case therefore is not a binding authority upon the question now before us, although of course the opinion of Parke, B., is entitled to be considered by us, as it has been, with very great respect.

Besides this authority, Mr. Wills relied, and very properly, upon the expressed opinion of the late Lord Chief Baron in the case now before us, and of course if that eminent judge had given the judgment of the Court upon that point we should have been bound by it, but as Huddleston, B., expressly declined to express any opinion upon it, and the judgment of the Court was limited to the answer to the other question in the case, all that the Lord Chief Baron said does not amount to an authority binding upon and cannot be acted upon by us if it be, as with

(1) 10 Ex. 766.

great respect it appears to us to be, opposed to principle and other authority.

No doubt there are also cases in which in actions upon covenants against incumbrances or to pay off specific incumbrances, it has been held that the damages are the diminution in value of the estate by reason of the existence of the incumbrances, and if the contract is to pay off a specific incumbrance the owner may recover the whole amount although no claim has been made or damage proved: *Lethbridge* v. *Mytton* (1); *Carr* v. *Roberts* (2); *Loosemore* v. *Radford* (3); *Hodgeson* v. *Wood* (4); but in those cases there is a specific covenant to pay a specific pecuniary compensation. The right is to have that pecuniary amount, and there can be no question therefore but that the pecuniary compensation is the very thing to be recovered.

On the other hand, there are authorities tending to negative Mr. Wills' proposition. In *Jones* v. *Gooday* (5), the plaintiff sued in trespass for taking away his soil, and Tindal, C.J., having directed the jury to give such damages as they thought the plaintiff had sustained by that act, the plaintiff moved for a new trial, contending that the direction ought to have been that the plaintiff was entitled to such a sum as would restore the land to the condition in which it was before the commission of the trespass, but the Court refused the rule, Lord Abinger saying, "all that he is entitled to is compensation for the damage he has actually sustained," and Alderson, B., saying, "The plaintiff is entitled, by way of compensation, to what the land was worth to him. If the principle for which Mr. Kelly contends were to be adopted, it would follow that a party who has let the sea in upon the land of another, the land itself being worth only 20*l.*, would have to pay by way of damages, the expense of excluding it again by extensive engineering operations. The same argument, I remember," he adds, "was urged in an action brought against the Regent's Canal Company, it was contended that they were bound to replace the soil they had taken away, or to pay such a sum in

(1) 2 B. & Ad. 772.
(2) 5 B. & Ad. 78.
(3) 9 M. & W. 65.
(4) 2 H. & C. 649.
(5) 8 M. & W. 146.

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damages as would enable the plaintiff to do so. The jury, however, did not adopt that view of the case, and the Court refused to disturb their verdict."

So also in *Oldenshaw* v. *Holt* (1) the defendant had agreed to build houses on the plaintiff's land to be demised to the defendant, and broke his contract, and the plaintiff afterwards recovered the land in ejectment, and had agreed to let the land to another upon more favourable terms. The defendant having in an action brought against him for the breach of this covenant paid 40*s.* into court, Lord Denman directed the jury to calculate what damage the plaintiff had sustained, and they found a verdict for the defendant, and the jury having found, upon a matter of calculation, that no damage had been sustained, the Court refused a new trial. No one suggested there that the plaintiff was entitled to the cost of building the houses upon the land.

Under these circumstances, we have come to the conclusion that the direction of the undersheriff upon this head of damages cannot be supported, and the rule therefore must on all grounds be absolute for a new inquiry.

Rule absolute.

Solicitor for plaintiffs: *P. B. Matthews.*

Solicitors for defendants: *Smith, Fawdon, & Low, for Grueber.*

(1) 12 Ad. & E. 590.

E. L.

THE QUEEN *v.* THE JUSTICES OF CUMBERLAND. Ex parte WAITING.

1881
Dec. 7

*Licensing Acts—Sale of Beer off the Premises—Application for Licenses—Value of House—*3 & 4 *Vict. c.* 61, *s.* 1—*The Licensing Act,* 1872 (35 & 36 *Vict. c.* 94), *s.* 45—*Notice to Applicant of grounds of Refusal—Wine and Beerhouse Act,* 1869 (32 & 33 *Vict. c.* 27), *s.* 8.

An application for a license to sell beer by retail not to be consumed on the premises was refused by justices, on the ground that the house was not duly qualified by law, not being of sufficient value under 3 & 4 Vict. c. 61, s. 1. The Wine and Beerhouse Act, 1869, s. 8, requires the justices, where such an application is refused on the ground that the house is not duly qualified as by law required, to specify in writing to the applicant the grounds of their decision. A minute of the decision with the grounds of it was made and read out by the chairman in Court, in the presence of the applicant, but no copy was delivered to him. On a rule for a mandamus to the justices to hear and determine the application :—

Held (by Field and Cave, JJ.), that the provisions as to rating qualification for houses for the sale of beer and cider for consumption off the premises under 3 & 4 Vict. c. 61, s. 1, had not been affected by the Licensing Act, 1872, s. 45, which must be construed as applying only to premises licensed before the Act, or to be licensed under it, for the sale of intoxicating liquor thereupon.

Held, also that, in the absence of any request by the applicant for a writing showing the reasons for the decision of the justices, the notice was sufficient.

Rule calling upon Justices of West Cumberland to shew cause why a writ of mandamus should not issue to them to hear and determine an application of Henry Waiting for a license to sell beer by retail to be consumed off the premises.

It appeared from the affidavits that on the hearing of the application, the justices had verbally stated that they refused the license on the ground that the premises were not proved to their satisfaction to be of the annual value of 15*l.* A minute of their decision was drawn up to this effect: "Henry Waiting's application for a license to sell wine, beer, porter, cider, and perry, not to be consumed on the premises, Derwent Road, refused because justices not satisfied as to the value." This minute was publicly read out in Court by the chairman in the presence of the applicant. The applicant did not either in Court or at any time afterwards make any application to the justices or their clerk for a copy of the minute, or for a written notification of the grounds of the decision.

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The rule was moved on three grounds. First, that the justices had not specified in writing to the applicant the ground of their decision, as required by s. 8 of the Wine and Beerhouse Act, 1869, under which, if a certificate in respect of a license to sell by retail beer, cider, or wine, not to be consumed on the premises is refused to the applicant, on the ground that the house in respect of which he applies is not duly qualified as by law is required, "the justices shall specify in writing to the applicant the grounds of their decision." Secondly, that the justices in taking 15*l.* as the required value of the house had looked to the existing population of Workington, and not to the last parliamentary census as they should have done under 3 & 4 Vict. c. 61, s. 1, and, thirdly, that no limit of value in respect of houses for which an "off" license is sought is necessary since the passing of the Licensing Act, 1872.

J. Paterson, shewed cause, and contended that, in the absence of any application for a copy of the reasons, the justices had sufficiently complied with the statute when they reduced them to writing and published them in Court. He cited *Hancock* v. *Somes* (1) and *Costar* v. *Hetherington* (2). He contended that as no point had been raised as to the population before the justices none could be raised now, and that 3 & 4 Vict. c. 61, s. 1, had never been expressly repealed, and that the first paragraph of s. 45 of the Licensing Act, 1872 (3), could not have been intended to do away with valuation of premises in respect of "off" licenses, but must be restricted to the subject with which the section was dealing, that is, "on" licenses, and is confined to a reservation of the existing regulations as to "on" licenses then in force, leaving

(1) 1 E. & E. 795.

(2) 1 E. & E. 802.

(3) 35 & 36 Vict. c. 94, s. 45: "Premises to which at the time of the passing of this Act, no license under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force prescribing a certain rent or value or rating as a qualification for receiving any such license."

"Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon, shall not be qualified to receive a license authorizing such sale unless the following conditions are satisfied. . . ."

new "on" licenses to be dealt with under the subsequent part of the section.

C. Wright, in support of the rule, contended that it was necessary to deliver a written specification to the applicant, and that the first paragraph of s. 45 of the Licensing Act, 1872, was perfectly general in its terms, and applied to these premises which had no license attached to them at the time of the passing of the Act of 1872.

FIELD, J. I think good cause has been shewn, and this rule should be discharged. The points involved are three in number. The first question is whether the magistrates have sufficiently heard and determined the matter. The applicant applied for a license to retail beer not to be consumed on the premises, which under s. 8 of the Wine and Beerhouse Act, 1869, can only be refused on one or more of four grounds. The fourth ground—"The applicant, or the house in respect of which he applies, is not duly qualified as is by law required," is the one that applies to this case. The magistrates heard evidence and witnesses in support of the application, but they were not satisfied as to the value. It is suggested that they took this value of 15*l.* on the erroneous assumption that the population was over 10,000—according to the last-published census for the time being. No point was raised before the magistrates as to whether this estimate was right, and no point is open on it now to the appellant. But then it is contended that the magistrates, when they came to that conclusion, did not specify in writing to the applicant the grounds of their decision, and so have not complied with the 8th section of the Wine and Beerhouse Act, 1869, and have not heard and determined the application. There is no doubt about the facts. The magistrates retired to consider the application, and determined to refuse it on the fourth ground, and thereupon the clerk drew up a minute in writing to the effect that the magistrates refused the application on the ground that they were not satisfied the value of the house was sufficient to qualify it according to law. On their return the chairman read out that minute in the presence of the applicant. It is difficult to see what more the justices should have done. If the applicant had asked for a copy and had been

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refused, the matter might have been different; but here the grounds of the decision were specified in writing and read out to the applicant. Under these circumstances, I think there was a sufficient compliance with the Act, and that this ground for a mandamus fails. But then it is said that s. 1 of 3 & 4 Vict. c. 61, is repealed by s. 45 of the Licensing Act, 1872. It is not said that there is any express repeal, but that the subsequent legislation is inconsistent with the prior, and that the older must give way. The person who drew the Act of 1872 has not made his meaning clear, but it certainly could not have been the intention of the legislature to abolish altogether the necessity for any qualification in respect of value for houses with "off" licenses. We must gather the intention of an Act from the words used, but a reasonable meaning should certainly be attached to them rather than one which produces an unreasonable result. The legislature were making a new code of regulations for "on" licenses, and intended to make the qualifications to which houses with such licenses were subject higher than before, so as to insure a better class of houses. In effect, they say we will not disturb any license existing, but an application for a new license must be made under the new regulations. It was not intended to deal with the valuation of "off" licensed houses. It is quite clear some restriction must be placed on the word "premises" in this section, otherwise the result would be absurd, and I think the limitation which we impose is the correct one.

CAVE, J. I am of the same opinion. The statute requires the justices to specify in writing the grounds of their decision to the applicant. That is for his benefit, so that he may know on what the decision is founded. If they had been asked for a copy of the minute and had not given it they might have been held to have contravened the Act, but I do not think they are bound to force a copy on the applicant in order to comply with the statute.

As to the question of the repeal of 3 & 4 Vict. c. 61, s. 1, we must put a reasonable construction on the Licensing Act, 1872. The only way, in my opinion, that we can do so is to place some limitation on the general expression "premises" in s. 45, and the construction most consistent with the context is a limitation of

the application of the section to premises for which an "on" license is sought. Thus interpreted, it leaves those who already had licenses under the regulations before in force, while those who had not licenses but subsequently asked for them, must comply with the regulations contained in this Act.

Rule discharged.

Solicitors for applicant: *Wood & Wootton, for T. Milburn, Workington.*

Solicitors for justices: *Roberts & Gillett, for E. Atter, Whitehaven.*

A. M.

GRAFF, APPELLANT; EVANS, RESPONDENT.

1882
Feb. 28.

Licensing Acts—Clubs—Intoxicating Liquors—"Sale by Retail"—The Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

The appellant was manager of an institution carried on bonâ fide as a club, under rules by which members paid an entrance fee and subscription; trustees were appointed in whom all the club property was vested, and there was a committee of management (for whom the appellant acted) to conduct the general business. The club was not licensed for the sale of intoxicating liquors, but these were supplied, at fixed prices, to members for consumption on and off the premises, 33 per cent. above the cost price being charged for liquors to be consumed off the premises, and the money produced thereby going to the general funds of the club. The appellant having, in the course of his employment as manager, supplied intoxicating liquors to a member (who paid for them) for consumption off the premises:—

Held, that the appellant did not "sell by retail" intoxicating liquors within the meaning of s. 3 of the Licensing Act, 1872, and therefore was not liable to conviction for an offence under the section.

CASE stated by one of the magistrates of the Westminster Police Court, under 20 & 21 Vict. c. 43.

On the hearing of a complaint preferred by the respondent against the appellant under s. 3 of the Act 35 & 36 Vict. c. 94 (the Licensing Act, 1872), that he, the appellant, did on the 4th of May, 1881, in the parish of St. George, Hanover Square, in the county of Middlesex, unlawfully sell and expose for sale by retail, certain intoxicating liquor without being duly licensed to sell the same, the appellant was convicted and adjudged to pay a penalty of 20*s.*

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The Grosvenor Club, situate at 200, Buckingham Palace Road, is a bonâ fide club, properly constituted. Trustees of the club property are appointed, and there is a managing committee to conduct the general business of the club. The appellant Graff was the manager of the club acting for the said committee.

There are about 1100 members of the club, who pay an entrance fee and periodical subscriptions.

The objects of the club are social intercourse, mutual and moral improvement, aided by lectures and rational recreation. One object also is to keep the members away from the public-house. They can obtain food and refreshments in the club, and also wine, beer, and spirits on payment. The produce of such sales goes to the funds of the club. The club has no license to sell.

The evidence shewed that Foster, a member of the club, purchased on the 4th of May last, at the bar of the club, a bottle of whisky and a bottle of pale ale, and paid 3*s.* 11*d.* for the two. The barman wrapped them up in paper, and Foster carried them away out of the club openly and without concealment.

It was also shewn that liquor to the value of 200*l.* was sold annually to the members for consumption off the premises, and that there was a profit on such sales to the amount of 33 per cent. on the original cost.

The magistrate was of opinion that the Grosvenor Club was not a partnership, because not an association formed for the purpose of realizing a joint profit, though the members might be joint owners; that the question whether supplying liquor to be consumed off the premises was a trading within the Act depended upon whether or not the club derived a profit therefrom; that if the cost price only was charged there was no sale within the Act, because the transaction would only be a mode of subdivision among the members—the club committee would be the agents of the members to purchase, and the members would only be repaying their agents the cost price—but that if, as was the case here, a profit was made of which the members had the advantage, there was then a sale within the meaning of the Act.

The question for the opinion of the Court was, whether the sale in question of whisky and ale to Foster was a sale of intoxicating

liquor by retail within the meaning of the 3rd section of 35 & 36 Vict. c. 94, requiring the seller to be duly licensed.

By r. 6 of the Rules of the Club referred to in the case, "the business of the club shall be carried on by a committee of management, consisting of the trustees for the time being, the treasurer and twenty-four other members . . . to be elected at the half-yearly meeting of the members of the club."

By rule 7 "all property acquired by the club shall be vested in the trustees."

Rule 8 provides for the appointment of a treasurer, who is to be responsible for all sums of money paid into his hands on account of the club.

By rule 9 the general business of the club shall be conducted by the committee, subject to these rules.

Sir F. Herschell, S.G. (*A. L. Smith,* with him), for the appellant. Sect. 3 of the Licensing Act, 1872, enacts that "no person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same," and s. 74 defines "license" as a license granted by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828 (9 Geo. 4, c. 61). In that Act the recital declares it expedient to reduce into one Act the laws relative to the licensing of persons keeping "inns, ale-houses, and victualling houses to sell exciseable liquors by retail," and by s. 37 the words "inn, ale-houses, and victualling house shall be deemed to include all houses in which shall be sold by retail any exciseable liquor to be drunk on the premises." It is clear, therefore, that s. 3 of the Act of 1872 is aimed at sales in places of public resort. "Sale by retail" means sale to any member of the general public who may come to buy, and the proprietor of a licensed house has no option to refuse to admit the public to his premises. That is shewn by s. 18, which was necessary to give him power to exclude drunkards. This club, therefore, not being a place of public resort, could not be licensed for the sale by retail of exciseable liquors. A license to sell off the premises only could not be granted to the club under 9 Geo. 4, c. 61; *Reg.* v. *Wilkinson.* (1) Clubs have never been considered

(1) 10 L. T. (N.S.) 370.

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as requiring a license from the passing of the Act of 1828 up to the present time. If s. 3 of the Act of 1872 applies to this club at all, it applies to sales of liquors on the premises, and a decision to that effect would render illegal sales of liquor in all clubs as hitherto carried on. There is no profit in the sense of trader's profit. Whether the member is charged more than the cost price of the liquors or not, can make no difference in the question of sale or no sale. What is termed the "profit" would go in reduction of the general expenses of the club, and for anything that is stated in the case the 33 per cent. excess charged for liquors to be drunk off the premises would be exhausted in providing for the expenses of that particular branch of the club's transactions. Graff, the manager, made no contract of sale with Foster. Foster was a co-owner of the liquors with all the other members of the club for whom Graff sold. It would follow, if an offence under s. 3 was committed, that Foster himself and all the other members were guilty of it. It is submitted that this was not a "sale by retail" within the section.

Stavely Hill, Q.C. (*Bremner*, with him), for the respondent. The transaction between Graff and Foster was "a transaction in the nature of a sale" within the description in s. 62 of the Licensing Act, 1872. A sale is defined in Benjamin on Sales, 2nd ed. p. 1, to be "a transfer of the absolute or general property in a thing for a price in money." The transaction here comes within that definition. By the rules all the club property vests in the trustees. Foster in buying the liquors was in the position of a joint-owner buying the shares of his co-owners—it is a sale of those shares. According to the findings of the case, Foster could have been indicted for a larceny of the liquors, the property being laid in the trustees: *Reg.* v. *Burgess.* (1) There was equally a "sale" within the meaning of s. 3, whether the transfer was of the shares of the other members in the chattel, or a transfer of the chattel itself. The magistrate was right in coming to the conclusion that a "profit" had been made on the transaction, which was a material element in determining the question of sale.

Sir F. Herschell, S.G., in reply. The definition in Benjamin on Sales is given only for the purpose of distinguishing between

(1) L. & C. 299; 32 L. J. (M.C.) 185.

sale and barter. This was not a sale of intoxicating liquors, but a release of the interest of the other joint-owners in the whisky and beer.

FIELD, J. I have come to the conclusion that the question put to us by the magistrate must be answered in the negative. The introduction of the word "sale" in the earlier part of the question is for convenience merely; the question is really meant to be, whether the facts stated in the case with respect to the transfer of the whisky and beer amount or not to a sale of intoxicating liquors by retail within the meaning of the 3rd section of the Licensing Act, 1872. It is to be observed that the provision we have to construe is to be found for the first time in this Act. Provisions in respect to the "sale" of intoxicating liquor occur often in similar legislation, but by s. 3 a new and distinct offence is created. In construing a statute like the present, by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within the section. It is not disputed that the club was bonâ fide a club. The club property by the rules was vested in certain trustees, no doubt for the purpose, as was suggested in argument, of enabling them to sue or take other legal proceedings both of a civil and criminal nature with respect to injuries to the possession of the goods belonging to the club. No doubt other special properties in the goods of the club are created and given to officers of the club other than the trustees. Thus the treasurer has a special property in the funds of the club, and the manager has a special property in the liquors, and may part with them without the permission of the trustees. He acts for the committee, who are his masters, as are also in a sense all the members of the club. The goods would, I presume, be bought by the committee and paid for by cheque out of the funds of the club. It is to be observed that the magistrate in stating the case cannot have used the word "profit" in its general sense of "trade profit." The finding really is meant to be that the liquors consumed off the premises were parted with to members at 33 per cent. more than the original cost; the excess charged might be intended to meet the expenses of that

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particular branch of the club's dealing. I think the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods, although they had other agents with respect to special properties in some of the goods. I am unable to follow the reasoning of the learned magistrate in saying that the question depends upon whether or not a profit was made upon the sale of the liquors. It appears to me immaterial whether the sum a member pays for the liquor is equal to or more or less than the cost price. The transaction does not become the more or the less a sale on that account. It cannot be the true view that if the member pays a sum exactly equal to the cost price there is no sale within the section, but that if he pays more than the cost price there is. The section must be construed by looking at the language used, and taking a large view of the object of the legislation. The legislature have come to the conclusion that it is unadvisable that intoxicating liquors should be sold anywhere without a license. The enactment is limited to "sales" of intoxicating liquors, and only seems aimed at sales by retail traders, because the wholesale trader is not touched. The question here is, Did Graff, the manager, who supplied the liquors to Foster, effect a "sale" by retail? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and delivered. There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special

property in the goods to Foster, which was not a sale within the meaning of the section. I am of opinion that the conviction should be reversed.

HUDDLESTON, B. I am of the same opinion. I agree with the Solicitor-General that s. 3 applies equally to sales within and off the premises. If the conviction was right it must follow that sales of liquor in every club are illegal without a license. I think those who have framed the legislation since 1828 never considered or intended clubs to come within the Licensing Acts. It seems to me clear that Foster had a property or at least an interest in the goods which were transferred to him. Mr. Hill rightly designated that interest as a one eleven hundredth share. Foster on payment got from the barman who served him the interest of the other 1099 members who thereby transferred their interest to him. There was no transfer of the general or absolute property in the goods to Foster, but a transfer of a special interest. That, in my view, was the result of the transaction. I cannot think it was a sale of intoxicating liquors by retail. It is obvious from *Reg.* v. *Wilkinson* (1) that clubs of this kind never could obtain a license to sell liquor off the premises only. I am of opinion that this was not a sale within the meaning of the Act.

Judgment for the appellant.

Solicitors for appellant: *Lewis & Lewis.*
Solicitor for respondent: *A. J. Bristow.*

(1) 10 L. T. (N.S.) 370.

W. A.

1881

Dec. 13.

FEAR *v.* CASTLE AND WIFE.

Husband and Wife—The Married Woman's Property Act (1870) *Amendment Act*, 1874 (37 & 38 *Vict. c.* 50), *s.* 5—"*Subsequent Action*"—*Construction of.*

The Married Woman's Property Act, 1874, s. 5, enacts that when a husband after marriage has a judgment bonâ fide recovered against him in any action brought under the Act to recover a debt of the wife contracted before marriage, "then to the extent of such judgment the husband shall not in any subsequent action be liable":—

Held, that the words "any subsequent action" mean any action commenced subsequently to the time of bringing the action in which judgment has been recovered, and not merely any action commenced subsequently to the recovery of the judgment.

SPECIAL CASE.

The material parts of the case, for the purposes of this report, were as follows:—

1. On the 31st of December, 1875, the defendant Annie Castle, then Annie Arney, widow, by her promissory note, now overdue, promised to pay to the plaintiff 50*l.* and interest thereon, and the sum of 55*l.* 9*s.* was, at the commencement of the action, due to the plaintiff upon the same note.

2. The defendant Annie Castle was married to the defendant A. B. Castle in January, 1881.

3. This action was commenced on the 7th of March, 1881.

4. At the commencement of this action the defendant A. B. Castle was possessed of certain articles of furniture and a mare, which had been the property of his said wife before her marriage, and were of the value of 50*l.*, and had, upon the marriage, vested in the defendant A. B. Castle. Save as aforesaid, no personal estate in possession has come to the hands of the defendant A. B. Castle in right of his wife.

5. An action having been, on the 5th of March, 1881, brought by one G. Nowell against the said A. B. Castle, jointly with his said wife, for a debt contracted by her before her said marriage, judgment was, on the 19th of March, 1881, signed in the said action against the said A. B. Castle, in respect of the assets in the last preceding paragraphs mentioned, for the sum of 50*l.*

Execution issued, and the goods were seized by the sheriff and sold.

The question for the opinion of the Court is, whether, under the circumstances hereinbefore mentioned, the plaintiff is entitled, under the provisions of the Married Woman's Property Act (1870) Amendment Act, 1874, to judgment against the defendant A. B. Castle, jointly with his wife or otherwise, for any and what sum.

K. E. Digby, for the plaintiff. The words "any subsequent action" in s. 5 of 37 & 38 Vict. c. 50 (1), refer to actions commenced subsequently to the recovery of judgment in the action in which judgment was recovered. That is the grammatical construction of the language. The plaintiff in the present action, which was commenced before judgment was recovered in Nowell's action, is therefore entitled to judgment for the value of the furniture and mare. It would be a hardship upon the plaintiff if after action brought his claim could be defeated by reason of the defendant allowing judgment to be signed in another action for the amount of the personal estate of the wife in his possession.

C. R. Poole, for the defendant, was not heard.

FIELD, J. The question before us involves the construction of an Act passed to obviate what was considered the injustice resulting to creditors from the state of the law that, whilst the property of a woman went to her husband on her marriage, he was not under any liability to pay her debts contracted before marriage. The legislature has provided a remedy co-existent and co-incident with the injustice. The principle of the Act is clearly to make the husband liable in the event of his having funds of his wife actually in his hands, and to the extent only of those funds. If Mr. Digby's construction of s. 5 is adopted, the husband might

(1) The 37 & 38 Vict. c. 50, enables a husband and wife to be jointly sued for her debts contracted before marriage, and the husband is to be liable in such action to the extent only of the assets specified in s. 5, which, amongst other assets, specifies, (1) the value of the personal estate in possession of the wife which shall have vested in the husband: "Provided that when the husband after marriage pays any debt of his wife, or has a judgment bonâ fide recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable."

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be compelled to pay his wife's debt, although all the funds in his hands had been exhausted by payment, or by judgment recovered. He might be compelled to pay six times the amount of the funds in his hands in six different actions commenced before judgment was recovered in one action. It is not denied that the action in which the sheriff seized the husband's goods in the present case was brought bonâ fide. The husband had no defence whatever to that action. It is clear that the legislature used the language in the proviso in its ordinary and natural sense. The plain meaning of "any subsequent action" is, "any action commenced subsequently to the commencement of the action in which judgment has been recovered," and not "any action commenced subsequently to the recovery of the judgment." I may add that I am by no means sure that what occurred in the present case was not equivalent to a payment of the wife's debt by the husband within the proviso.

CAVE, J. I am of the same opinion. It would require very strong words to induce the Court to place upon the proviso a construction so repugnant to the rest of the Act as that contended for. Sect. 2 enables the husband to plead in bar that he has no assets of his wife in his hands wherewith to satisfy the creditor, and, since the Judicature Acts, by Order XX., rule 3, if the matter to be pleaded in bar arose after action brought, the defendant may allege it as a defence in his statement of defence, and the plaintiff may thereupon confess the defence and sign judgment for his costs, so that no hardship results to him.

Judgment for the defendant.

Solicitors for plaintiff: *Torr, Janeway, Gribble, & Oddie, for Barham & Son, Bridgwater.*

Solicitors for defendants: *Prideaux & Sons, for J. R. Poole & Son, Bridgwater.*

W. A.

THE QUEEN ON THE PROSECUTION OF ALFRED KING *v.* HANDSLEY AND OTHERS, JUSTICES OF THE BOROUGH OF BURNLEY.

1881
Dec. 20.

Justices of Peace—Interest disqualifying—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 258—*Town Council—Enforcing Borough Rate.*

Where by statute a member of the town council of a borough may act as a justice of the peace in matters arising under the Act, in order to disqualify him from so acting it is not sufficient to shew that, as a member of the town council, he has a pecuniary interest in the result of the information or complaint, or that the corporation of which he is a member are the prosecutors, but it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter.

Reg. v. *Gibbon* (6 Q. B. D. 168) disapproved.

An officer of a corporation appointed to collect the borough rate obtained a summons against a ratepayer in arrear. In so doing he acted in the discharge of his duty, but on his own responsibility and without consulting the town council. At the hearing the justices dismissed the summons, on the ground that one of the sitting magistrates being a town councillor was thereby disqualified from adjudicating upon the summons. On motion for a mandamus to the justices to hear and adjudicate on the summons:—

Held (by Field and Cave, JJ.), that there was no ground for supposing either substantial interest or likelihood of bias, and consequently no disqualification.

RULE calling on Robert Handsley and others, justices of the borough of Burnley, to shew cause why a writ of mandamus should not issue commanding them to hear and adjudicate on a summons obtained by one King against an inhabitant of the borough for non-payment of the borough rate.

It appeared (1) that King, who was an officer of the corporation, was charged with the duty of collecting the borough rate, and, in the discharge of such duty, applied for summonses against such ratepayers as were in arrear. In so doing he exercised his own discretion and acted on his own responsibility, and did not consult the town council, or any committee or member thereof. In the present case King obtained a summons from a justice who was not a member of the town council, but on the hearing of the summons the justices refused to adjudicate, and dismissed the summons on the ground that one of the sitting magistrates being a town councillor was thereby disqualified from adjudicating upon the

(1) The statement of facts is taken from the judgment of the Court.

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summons. The other justices present were not members of the town council, but were all burgesses of the borough.

The levying, collection, and enforcement of the borough rate in Burnley are governed by a local Act, the Burnley Borough Improvement Act, 1871 (34 & 35 Vict. c. cliv.) Sect. 502 of this Act is similar in its effect to s. 258 of the Public Health Act, 1875, and by it it is enacted that, "Except as expressly otherwise provided, any person shall not be disqualified or disabled to act as justice of the peace, coroner, juror, or otherwise, in any matter arising under or in relation to this Act, by reason of his being a ratepayer in the borough, or liable to any payments under this Act, or a member of the council or of any committee thereof."

1881. Dec. 7. *Channell*, for the prosecution. The objection raised that one of the justices is a member of the town council, and therefore virtually prosecutor, would apply to every burgess, and so, probably, to every borough justice. *Reg.* v. *Gibbon* (1) would seem to be an authority in favour of the view taken by the justices, but it is inconsistent with *Reg. v. Meyer.* (2) In *White* v. *Redfern* (3), reported on another point, the question of interest was involved, and it was necessary to decide it, and unless decided in favour of the view now urged, the second point would not have arisen. The rule to be gathered from the cases is that, in order to disqualify, there must be circumstances likely to produce a bias, and that merely belonging to the prosecuting body is not such a circumstance, and does not disqualify.

Sir H. Giffard, Q.C., shewed cause. The justices were right, for, in the words of Blackburn, J., in *Reg.* v. *Meyer* (2), the justice in question was sitting as a judge on an information arising out of a matter in which he was a litigant party with the defendant. The section of the local Act which corresponds with s. 258 of the Public Health Act, 1875, prevents the small pecuniary interest of a ratepayer or person contributing to or benefited by any fund from acting as a disqualification, but the objection here is that, as a member of the town council, this gentleman is virtually prosecutor: *Reg.* v. *Milledge* (4); *Reg.* v. *Gibbon* (1); and has such

(1) 6 Q. B. D. 168.
(2) 1 Q. B. D. 173.
(3) 5 Q. B. D. 15.
(4) 4 Q. B. D. 332.

an interest as might give him a bias in the matter: *Reg.* v. *Meyer*. (1)

Channell, in reply.

Cur. adv. vult.

1881. Dec. 20. The judgment of the Court (Field and Cave, JJ.) was read by

CAVE, J., who, after stating the facts as above set out, proceeded:—It was contended for the Crown that s. 502 of the Local Act authorized the justice in question to act, although he was a member of the town council.

For the defendants it was submitted that the section in question does not empower any town councillor to act in cases in which the corporation are themselves the prosecutors, and that in this case the corporation were in fact by their officer the prosecutors, and the cases of *Reg.* v. *Milledge* (2), *Reg.* v. *Gibbon* (3), and *Reg.* v. *Meyer* (1), were cited in support of this contention.

In *Reg.* v. *Milledge* (2) complaint had been made to the Local Government Board of a nuisance arising from a piece of water in Weymouth, and the board thereupon required the town council of Weymouth to abate the nuisance. The town council passed a resolution that steps should be taken against the owners of the water for the abatement of the nuisance. Two justices of the borough, who were members of the town council, and who had taken an active part in discussions on the question, were, with four other magistrates, on the bench of justices when the summons against the owner of the water came on for hearing. They refused to retire, although the defendant objected to their sitting, on the ground that they were the prosecutors. The defence was that the nuisance was caused by the town council themselves sending the drainage of the town into the water complained of. The defendant was convicted by a majority of four to two, the justices in question voting in the majority, and it was held that under the circumstances they were disqualified for acting. It is obvious that in this case the justices were sub-

(1) 1 Q. B. D. 173.

(2) 4 Q. B. D. 332.

(3) 6 Q. B. D. 168.

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stantially interested in the proceeding adjudicated upon so as to be likely to have a real bias in the matter. *Reg.* v. *Meyer* (1) is a similar case, and the decision there is put on that very ground, and it is pointed out that the interest—where not pecuniary—must be substantial, so as to make it likely that the justice has a real bias, and that the mere possibility of bias is not sufficient to disqualify. In *Reg.* v. *Justices of Huntingdon* (2), it was held, in accordance with this distinction, that justices who were members of the town council of a borough, and as such had taken an active part in the making of an order under the Dogs Act, 1871, were not thereby disqualified from sitting to hear a complaint of non-observance of the order. In *Reg.* v. *Gibbon* (3), by a local Act for the improvement of a borough, the corporation was made the authority for the execution of the Act, with power to direct prosecutions for this purpose. An information for an offence under this Act having been preferred by an officer on behalf of the corporation, a summons was issued upon it by a justice who was an alderman and member of the corporation, but such summons came on for hearing before justices none of whom were connected with the corporation, the Court, however, held that such justices could not adjudicate upon the summons because it had been issued by one who was virtually prosecutor. The case of *Reg.* v. *Meyer* (1) was not cited there, and the Court does not advert to the distinction established by that case between a substantial interest likely to cause a real bias and the mere possibility of a bias. Still we might have felt ourselves bound by the decision in that case had it not been that in *White* v. *Redfern*, reported, but not on this point (4), the same question arose, and was decided the other way. Feeling ourselves thus at liberty to exercise our own judgment in the matter, we are of opinion that in cases like the present where such a section as s. 502 of this local Act exists, it is not enough to shew merely that an adjudicating justice is a member of the town council, and, as such, has a pecuniary interest in the result of the complaint or information, or that he is a member of the corporation which is charged with the duty of prosecuting the offence which he sits to adjudicate

(1) 1 Q. B. D. 173.
(2) 4 Q. B. D. 522.
(3) 6 Q. B. D. 168.
(4) 5 Q. B. D. 15.

upon, but that in order to disqualify the justice it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter. In our opinion there is in this case no ground whatever for saying that there was any such substantial interest or likelihood of real bias, and consequently the rule must be made absolute.

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Rule absolute.

Solicitors for applicant: *Milne, Riddle, & Mellor, for Creeke & Sandy, Burnley.*

Solicitor for justices: *E. Warriner, for J. Knowles, Burnley.*

A. M.

WESTON AND OTHERS *v.* THE MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT.

1882 *Feb.* 28.

Landlord and Tenant—Covenant in Lease against Carrying on Offensive Trade —Extra Rent reserved in case of breach of such Covenant—Forfeiture.

The defendants were assignees of the lease of certain premises, which had been demised by the plaintiffs for a term of years, the reddendum being as follows: "yielding and paying a yearly rent of 30*l.* by equal quarterly payments" on the usual quarter days, "and a like yearly rent of 25*l.* by like equal payments in case any of the trades, occupations, or things hereinafter covenanted not to be carried on or done upon the said premises shall be carried on or done."

The lessees, among other usual covenants, covenanted not to carry on upon the premises certain specified trades or businesses, nor any offensive, noisome, or noisy trade or business whatsoever, nor do, nor suffer to be done, anything which might be or grow to the damage or annoyance of the lessors. The lease contained a condition of re-entry if the said yearly rent of 30*l.* or the said further rent of 25*l.*, in case the same should become payable, were in arrear, or if and whenever there should be a breach of any of the covenants thereinbefore contained on the part of the lessees.

The defendants having carried on upon the demised premises a business within the terms of the above-mentioned covenant, the plaintiffs sued to recover the premises as upon a forfeiture of the lease:—

Held, that the lease could not be construed as meaning that the defendants were entitled to carry on the business in question upon payment of the additional rent mentioned in the reddendum, and that the plaintiffs were entitled to re-enter under the condition for re-entry.

Affirmed on appeal 9 Q.B.D. 404 C.A.

DEMURRER to the statement of defence in an action for the recovery of certain premises by the lessors against the assignees of the lease upon a forfeiture for breach of covenant.

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Statement of claim alleged that the lease contained a covenant on the part of the lessees for themselves, their executors, administrators and assigns, not to exercise or carry on, or suffer to be carried on upon the premises certain offensive trades or occupations in the lease more particularly mentioned, or any offensive, noisome, or noisy trade or business whatsoever, nor do nor suffer to be done anything which might be or grow to the damage or annoyance of the lessors, their heirs or assigns, or any of their tenants, that the lease contained a condition of re-entry for breach of any of the covenants to be performed by the lessees, and that the defendants, the assignees of the lease, carried on a certain offensive business or occupation on the premises and did and suffered to be done therein things which might be or grow to the damage or annoyance of the lessors, and that they converted the premises sought to be recovered into a depot for ambulances, horses, drivers and persons engaged in the removal of smallpox patients.

The statement of defence set out the reddendum of the lease and the condition of re-entry verbatim.

It was agreed that the Court should be at liberty to refer on the argument of the demurrer to the lease itself. The lease was of certain houses for a term of years, and the reddendum was as follows, "yielding and paying therefor during the said term unto the lessors the yearly rent of 30*l.* by equal quarterly payments on the 25th of December, &c. (setting out the usual quarter days), and also yielding and paying unto the lessors the further yearly rent of 25*l.* by like equal payments in case any of the trades, occupations, or things hereinafter covenanted not to be carried on or done upon the said premises, shall be carried on or done, the first payment of such last mentioned rent to be made on the first of the said days of payment of rent hereinbefore mentioned as shall happen next thereafter, and such last-mentioned rent to continue and be paid thereafter during the residue of the said term." Then followed covenants to pay rent, to repair, and other usual covenants by the lessees, and a covenant "not to carry on or exercise, or suffer to be carried on or exercised, upon the said premises, the trade of a victualler, ale-house keeper, tavern keeper, slaughterman, tallow-chandler, tobacco-pipe burner, soap-boiler, sugar baker, fellmonger, common brewer, dyer, dis-

tiller, currier, tanner, nightman, scavenger, slopseller, or seller of secondhand clothes, or railway grease for carriages, or of flaying horses, laying of night slop or night soil, or of bill posting or shewing advertisements, or any offensive, noisome, or noisy trade or business whatsoever, nor do, nor suffer to be done, anything which might be or grow to the damage or annoyance of the lessors, their heirs, or assigns, or any of their tenants." The condition of re-entry was as follows: "Provided always, that if the said yearly rent of 30*l.* hereinbefore reserved, or the said further rent of 25*l.* in case the same shall become payable, or any part thereof shall be in arrear for twenty-one days, or if and whenever there shall be a breach of any of the covenants hereinbefore contained on the part of the lessees, then it shall be lawful for the lessors to re-enter upon the premises, and the same to have and repossess as in their first and former estate, anything hereinbefore to the contrary notwithstanding."

Fullarton, in support of the demurrer. The reasonable construction of the lease is that it gives the lessors the alternative of exacting an increased rent if any of the prohibited businesses are carried on, or of re-entering for breach of the covenant. The trades and businesses specified by the covenant are of very various kinds, and in the case of some of them, and under certain circumstances, it might be sufficient remedy for the lessors to exact the increased rent without going the length of insisting on the forfeiture, whereas in the case of the other and more seriously offensive or noxious trades coming within the covenant, it might be most prejudicial to the lessors that the lessees should be entitled to carry them on subject to the payment of the increased rent. It is for the benefit of both parties, therefore, that the lessors should have an option of adopting one or other of those alternatives as the circumstances might render it desirable. But the reason of the thing and the accurate construction of the words used both negative the contention that the lessees were to be entitled to use the premises for any trade or purpose, however prejudicial to the lessors' interest, on payment of the increased rent. [He cited *City of London* v. *Pugh* (1); *Barrett* v.

(1) 4 Bro. P. C. 395.

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Blagrave (1); *Bringloe* v. *Goodson* (2); *Coles* v. *Sims* (3); *French* v. *Macale.* (4)]

Proudfoot, in support of the statement of defence. The clause of forfeiture is controlled by the earlier part of the deed. There is a reservation of an increased rent if any of the specified trades or any other business coming within the covenant is carried on. This is inconsistent with the idea that there is to be a forfeiture on such trade or business being carried on. The condition of re-entry must be read only as applicable to breaches of the other covenants. [He cited *Payler* v. *Homersham* (5); *Sicklemore* v. *Thistleton* (6); *Woodward* v. *Gyles* (7); *Legh* v. *Lillie.* (8)]

Fullarton, in reply, was not called upon.

MATHEW, J. I am of opinion that this demurrer must be allowed. It was contended for the plaintiffs that there was clearly a breach of covenant, and that under the condition of re-entry the term was forfeited. It was contended on the other hand for the defendants that, on the true construction of the lease, there was no forfeiture. The question is, therefore, what the lease means. It contains a covenant not to carry on certain specified trades or any other offensive trade, or business, and there is a clause of forfeiture in the most general terms in case of any breach of the covenants. It is argued that before we hold that there was a breach of covenant, causing a forfeiture, we must look to the reddendum, and that it shews that the lessees were to be at liberty to carry on the businesses, and do the things prohibited by the covenant, on condition that they paid an increased rent as provided for by the reddendum. It was, however, pointed out by the counsel for the plaintiffs that the reddendum itself, in terms, treats the acts, which according to the defendants' contention it authorised the lessees to do, as breaches of covenant. I cannot construe it as meaning that the lessees are to be entitled to do the things mentioned in the covenant upon payment of the increased rent. I think the lease must be construed as suggested by the plaintiffs' counsel, that is to say, the additional rent must

(1) 5 Ves. 555.
(2) 8 Sc. 71.
(3) 5 D. M. & G. 1.
(4) 2 D. & War. 269.
(5) 4 M. & S. 423.
(6) 6 M. & S. 9.
(7) 2 Vern. 119.
(8) 6 H. & N. 165.

be treated as a penal rent, but not as shewing that the carrying on of the trades in question is not a breach of covenant. So construing the lease, it seems to me that we give due effect to all its terms. For these reasons I think our judgment must be for the plaintiffs.

CAVE, J. I am of the same opinion. It seems to me that the lease gives the lessors two remedies; not that both can be exercised together, because, if the forfeiture is insisted on, thereafter no increased rent can accrue, and, if the increased rent is received, any existing cause of forfeiture is waived. They are alternative remedies in my opinion. Why should not the lease be so construed, and why should not there be a stipulation for such alternative remedies? Such a stipulation seems not unreasonable. Either of the remedies alone might be insufficient, or inappropriate. If the breach of the covenant is trivial, and if rents have fallen, to enforce the forfeiture might be very undesirable in the lessors' interests. On the other hand if the breach is a serious one, then the extra rent of 25*l.* might be an utterly inadequate remedy. It has been contended that the effect of the provisions of the lease is that of an agreement that the lessees may carry on the trades, or do the acts specified, on payment of a certain additional rent, not that of an undertaking by the lessees not to carry on the trades, or do the acts in question. That is to say, that, on payment of the extra rent, the lessees may use the premises to carry on any business, however offensive or noisome. Is it reasonable to suppose that this was intended? I cannot so read the lease. The words of it plainly import a covenant not to do the specified things. It seems to me, on the other hand, that the interpretation contended for by the plaintiffs' counsel gives a meaning to the whole deed which it may very reasonably have. For these reasons I think the demurrer must be allowed.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Perkins & Weston.*

Solicitors for defendants: *Charles Rogers, Sons, & Russell.*

E. L.

1882
March 3.

TURNER *v.* BRIDGETT.
WRIGHT, CLAIMANT.

Bankruptcy—Liquidation—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 87 *—Goods of a Trader taken in execution for a Sum exceeding* 50*l.—Abandonment of part of Judgment Debt.*

11 QBD 432.

Judgment was signed in an action against a trader for debt and costs amounting to less than 50*l.* The judgment creditor delivered to the sheriff a writ of fi. fa. endorsed to levy the amount of the debt and costs, with the expenses of and incidental to the execution. The expenses of and incidental to the execution, added to the amount of the debt and costs, made a total exceeding 50*l.*, but upon notice of a liquidation petition against the execution debtor, the execution creditor directed the sheriff's officer not to sell for an amount exceeding 50*l.*, and accordingly goods to the amount of 49*l.* 17*s.* only were sold:—

Held, that the execution creditor could, by abandoning so much of his judgment debt as might be necessary to keep the total amount for which the goods were sold under 50*l.*, avoid the operation of s. 87 of the Bankruptcy Act, 1869, and that, therefore, the execution creditor and not the trustee in liquidation was entitled to the proceeds of the execution.

Appeal withdrawn by consent 9 QBD 555

INTERPLEADER summons referred to the Court from chambers by Stephen, J.

The facts sufficiently appear from the judgment.

Feb. 15. *Dodd*, for the trustee in liquidation. The question turns on the true construction of the 87th section of the Bankruptcy Act, 1869. It is contended that the question under that section is for what amount the sheriff seizes. The words are "where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.* and sold." Here the writ was endorsed to levy for 44*l.* 9*s.* and the expenses of and incidental to execution. The decisions shew that all the expenses of the execution and sale are to be added to the judgment debt and costs in computing the amount for which the goods are to be deemed to be taken in execution. The goods here were, applying this test, taken in execution for an amount exceeding 50*l.*, for the expenses of execution and sale added to the amount of the judgment make a total exceeding 50*l.*: *Ex parte Liverpool Loan Co., In re Bullen* (1), *Ex parte Sims, In re Grubb.* (2)

(1) Law Rep. 7 Ch. 732. (2) 5 Ch. D. 375.

Dawson Yelverton, for the execution creditor. The cases shew that the execution creditor may abandon part of the judgment debt, and direct the sheriff to levy for less than the full amount of the debt and costs, and so keep the total amount levied under 50*l.*, and that in such cases the 87th section does not apply: *Ex parte Reya, In re Salinger* (1); *Ex parte Berthier, In re Hinks.* (2)

These decisions shew that there must not only be a seizure, but also a sale for over 50*l.* in order that the section may apply. Here neither at the time of seizure or sale was the sum of 50*l.* exceeded. For the original judgment debt and costs for which the seizure took place amounted to only 44*l.* 9*s.*, and the goods were ultimately sold for less than 50*l.*, inasmuch as the execution creditor abandoned so much of the debt as to keep the total, including the expenses of execution, under 50*l.*

Dodd, in reply.

Clement Scott, appeared for the sheriff.

Cur. adv. vult.

March 3rd. The judgment of the Court (Field and Bowen, JJ.) was delivered by

FIELD, J. This is a summons of interpleader referred to the Court by Stephen, J.

The question is whether the execution creditor or the trustee in liquidation of an execution debtor is entitled to the proceeds of a levy in execution made by the former.

The judgment under which the writ of execution was issued was signed on the 24th of November, and was for a sum less than 50*l.*, viz., 44*l.* 9*s.* including the debt recovered and the costs of the action. The writ was delivered to the sheriff on the same day indorsed to levy 44*l.* 9*s.*, with sheriff's fees and poundage and all other legal and incidental expenses, and if the direction to levy had continued unaltered the sum levied under the writ would have exceeded the sum of 50*l.*, the fees, poundage, legal and incidental expenses having at the time of the sale amounted to more than enough to bring the amount with the debt to more than that sum. On the 25th of November a petition for liquidation of the affairs of the debtor was presented, and on the 30th

(1) 6 Ch. D. 332. (2) 7 Ch. D. 882.

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notice of it was given to the execution creditor. He on the same day gave notice to the sheriff's officer in possession directing him not to sell goods beyond 50*l.*, and the sheriff's officer undertook not to do so. He accordingly sold goods realising a total of 49*l.* 17*s.*, which was thus made up; Poundage, 2*l.* 9*s.* 10*d.*; Levy fee, 1*l.* 1*s.*; Possession nine days, 2*l.* 5*s.*; Expenses of sale, 2*l.* 10*s.*; Debt and costs, 41*l.* 11*s.* 2*d.*; Total 49*l.* 17*s.*; and it is a portion of this sum, i.e., the debt and costs 41*l.* 11*s.* 2*d.* which is in dispute. Now the question whether it belongs to the execution creditor or the trustee depends for its answer upon the meaning of the 87th section of the Bankruptcy Act of 1869, read in conjunction with s. 5, sub-s. 5 of the same Act. By the latter section, a petition for adjudication of bankruptcy may be presented against a trader debtor, where execution issued on any legal process for the purpose of obtaining payment of not less than 50*l.* has been levied by seizure and sale of his goods, by which section, therefore, no status of bankruptcy is conferred on a debtor until "sale."

By s. 87 it is provided that where the goods of a trader have been "taken in execution" in respect of a judgment for a sum exceeding 50*l.* and "sold," the sheriff in the events which have happened in this case is to hold the proceeds of the sale, after deducting expenses, in trust to pay them to the trustee; but if no notice of a petition for liquidation is served or no adjudication made on any petition the sheriff is to deal with the proceeds according to his mandate.

Now it will be observed that these sections are not correlative; that the status of bankruptcy does not come into existence merely where there has been a judgment, whilst the trustee is entitled to the proceeds of the levy only where the taking in execution and sale are in respect of a judgment. In the absence also of any indication in the statute of the principle upon which these two sections are based, or of the reason why 50*l.* should be the limit, or why the 50*l.* is to be fixed by the amount recoverable at the date of the judgment, or the levy, or the sale, the construction of the section may be thought not to be free from difficulty.

If we had been left to our own unaided construction we should have been inclined to think that the true period of time and the true measure of amount were to be found at the date of the

judgment and in the sum ascertained by it, for whilst on the one hand that period and measure are fixed and permanent, on the other hand, if they are to be taken at any later period, the legislation ceases to give any certain measure. If, however, the time and amount are to be fixed at a later period than the judgment it must be either that of the levy or that of the sale, but, inasmuch as the direction to levy is the act of the creditor who may direct any sum less than the amount of his judgment to be levied, *Ex parte Berthier* (1), this construction leaves the amount uncertain up to the time of and dependant upon his election.

Again, if they are to be ascertained at the date of the sale, then other elements of the amount to be levied have intervened, some reasonably certain, such as expenses of execution and levy fee, others absolutely uncertain, such as poundage (varying according to the amount of the proceeds of the sale as they are less than or equal to the debt) and possession money, varying according to the length of the time during which a sheriff's officer may properly or improperly hold the goods before sale. These reasons seem to shew that the true construction should be in favour of the earlier period.

But, however this may be, we are not at liberty to act on any view of our own upon this question, for these sections have received a judicial construction by which we are bound.

The true construction of the section is, says the late Lord Justice James, with the concurrence of Lord Justice Mellish, "taken in execution for a sum exceeding 50*l.* in respect of a judgment," and the plain meaning of the words, he says, is that they apply where a levy has been made for a sum exceeding 50*l.* and the goods sold: *Ex parte Liverpool Loan Company, In re Bullen.* (2) And in accordance with that construction the Appellate Court in that case confirmed the order of the Chief Judge directing the proceeds to be paid over to the trustee, the excess beyond 50*l.* having been brought into existence by the addition to the debt of the costs of execution.

In a subsequent case, indeed,—*Ex parte Sims, In re Grubb* (3), Mellish, L.J., expressed a doubt whether the amount in the

(1) 7 Ch. D. 882. (2) Law Rep. 7 Ch. 732.

(3) 5 Ch. D. 375.

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statute ought not to have been confined to the judgment debt and interest, but he did not dissent from the conclusion at which the other members of the Court (James and Baggallay, L.JJ.) arrived, which was that the amount was to be that which the sheriff was to levy by sale, and therefore included at least one day's possession money, which the Chief Judge had assumed as a necessary incident, and the addition of which five shillings made the amount in that case 50*l.* 2*s.* 6*d.*, which was handed over to the trustee in bankruptcy. The construction thus put upon the section in *Ex parte Liverpool Loan Company* (1) was followed (without expression of either approval or doubt) by the Exchequer Division in *Howes* v. *Young* and *Howes* v. *Stone* (2), in one of which cases the statutory amount of 50*l.* was made up by including poundage, which was thought by Bramwell, B., to be certain, and, in the other case, by poundage and levy fee. In *Ex parte Reya, In re Salinger* (3) it was held, as it seems to us rightly, that it was not the actual debt due by the judgment debtor which was to form the limit, and that, therefore, where the execution creditor had recovered a debt exceeding 50*l.*, but had signed judgment for less than that sum, he was entitled to the proceeds of the levy. The Chief Judge in Bankruptcy carried this doctrine one step further by holding that a creditor who had recovered 5000*l.* might levy for any part of his debt under 50*l.*, and so entitle himself to the proceeds: *Ex parte Berthier.* (4)

Now in the present case the judgment creditor is, in our opinion, entitled to the proceeds, whether it is the judgment or the subsequent levy fee and expenses which are to be regarded as the criterion. If the judgment is to rule, the judgment debt is less than 50*l.*, and is therefore within the words of the statute read in their natural order and according to what would have seemed to us their natural sense. If, on the other hand, the matter is to be decided according to the principles laid down and acted upon in the authorities we have referred to, yet, inasmuch as the execution creditor before sale directed that less than 50*l.* should be levied, and the sale made was accordingly limited to a sum which, with all charges and expenses, was under 50*l.*, and as,

(1) Law Rep. 7 Ch. 732.
(2) 1 Ex. D. 146.
(3) 6 Ch. D. 332.
(4) 7 Ch. D. 882.

according to these authorities, the real question is, what is the amount actually levied by sale, it follows that the execution creditor is equally entitled.

We therefore bar the trustee, the claimant, with costs, leaving the sheriff to proceed in due course to deal with the proceeds, according to his duty, under the fi. fa.

Judgment accordingly.

Solicitors for claimant: *Thomas White & Sons.*
Solicitor for execution creditor: *G. H. Carthew.*
Solicitors for sheriff: *T. White & Sons, for Hand & Co.*

E. L.

TEMPLEMAN, APPELLANT; TRAFFORD, RESPONDENT.

Nov. 16.

The Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *s.* 17—*Poison, sale of*—*Label*—*Name and Address of "Seller."*

The Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 17, enacts that it shall be unlawful to sell any poison unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word poison, and with the name and address of the seller of the poison, and any person selling poison otherwise shall upon summary conviction be liable to a penalty, and for the purposes of this section the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller.

The respondent sold at his shop in Friar Street, Oxford, a packet of poison labelled only, "W. Paterson, chemist and druggist, 3, Cowley Road, Oxford"—the name and address of a registered chemist who had supplied the poison to the respondent, and paid him a commission on the sale:—

Held, that the respondent was the "seller," with whose name and address the packet should have been labelled, and he was liable to a penalty under s. 17, which applies to the person keeping the shop or conducting the business in which the sale is made.

CASE stated by justices for the city of Oxford under 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act, 1879.

An information preferred by the appellant against the respondent under 31 & 32 Vict. c. 121, s. 17, charging that the respondent unlawfully did sell a certain poison, to wit, red oxide of mercury,

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the same not being in a box, wrapper, &c., distinctly labelled with the name and address of the seller, contrary to the Pharmacy Act, 1868, was heard, determined, and dismissed by the justices, subject to the following Case.

On the hearing of the information it was proved that the appellant on the 15th of June, 1881, entered the shop situate at No. 100, Friar Street, in Oxford, over which shop no name was painted up, and, inter alia, asked a woman who was behind the counter for a pennyworth of red precipitate, and was supplied by her with a packet of the same for which the appellant paid the woman. The packet was not labelled with the name and address of the respondent, but was labelled with a label in print thus: "W. Paterson, chemist and druggist, 3, Cowley Road, Oxford." The appellant took the packet and its contents away with him, and having analysed the contents found the packet to contain red oxide of mercury.

It was admitted by the respondent that the appellant had been served with the red oxide of mercury at the shop situate at No. 100, Friar Street, of which the respondent was the occupier, and in respect of which he alone was rated; and that red oxide of mercury was an article which by a resolution of the Pharmaceutical Society, duly perfected in accordance with the 2nd section of the Pharmacy Act, 1868, had been declared to be a poison within the meaning of the Act.

It was contended by the respondent that William Hay Paterson was a tenant of the respondent in respect of the use of one of the windows and part of the respondent's shop, and that he (the respondent) only acted as servant to Paterson in the sale of such red precipitate, and in support of such contention he called Paterson as a witness in his behalf, who deposed that he paid respondent 4*s*. a month for the partial use of one of the windows and of part of the shop, that he, Paterson, considered the respondent (if anything) was a servant of his, and that he employed him to sell goods for him; that he paid respondent no salary, but allowed him a commission of 10 per cent. on the sales; that he was accustomed to send down different articles to the respondent to be sold, but that he did not sell them to the respondent, nor did he ever invoice them to him, but that he

kept an account against respondent, and if any of the goods were destroyed he should want the respondent to pay him for them. He considered the packet in question sold to the appellant was his property and not the respondent's.

It was contended on behalf of the appellant that the packet was not properly labelled, that the respondent was not a servant of Paterson, within the meaning of s. 17 of the Pharmacy Act, 1868, but was the seller of the poison, and ought to have had his own name and address distinctly labelled upon the packet as provided by the section.

The justices were of opinion upon the facts before them that the contention of the respondent was well founded.

The questions of law were: Were the justices right in drawing the conclusion from the evidence that the respondent was servant of Paterson within the meaning of the 17th section? If the respondent was not the servant of Paterson but was his agent, did such agency carry with it such a contract of service as to bring the respondent within the 17th section, or did it not? Or, in one question and in other words, was the packet, in the opinion of the Court, sufficiently or properly labelled within the meaning of the 17th section of the Pharmacy Act, 1868?

Clement Higgins, for the appellant. The object of 31 & 32 Vict. c. 121 (The Pharmacy Act, 1868), ss. 15, 17, is that the sale of poisons to the public should be made by qualified chemists. The Act is evaded by qualified chemists in one town or place supplying unqualified agents keeping shops elsewhere with poisons for sale by retail. Sect. 15, which imposes a penalty on any person not being duly qualified, selling or keeping open shop for the sale of poisons, has been held to apply to the person or shopkeeper of whom the purchaser buys the poison: see *Pharmaceutical Society* v. *London and Provincial Supply Association*. (1) "The statute in order to be effectual must strike at the particular acts of those who actually conduct the sales," per Lord Selborne, L.C. The same construction must be put on the word "sell" and "seller" in s. 17, enacting that it shall be unlawful to sell any poison, either by wholesale or retail, unless the box, bottle, vessel,

(1) 5 App. Cas. 857.

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wrapper, or cover in which such poison is contained, be distinctly labelled with the name of the article and the word poison, and with the name and address of the seller of the poison, . . . and for the purpose of this section the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller. The respondent was the "seller," for he was the person actually conducting the sale, although the packet was handed over his counter by the woman to the customer. The respondent was not in any sense the servant of Paterson, but the woman was the servant of the respondent.

[GROVE, J.:—She may, however, be put out of consideration and the sale may be assumed to have been made by the respondent personally. If so, then as the justices have found that the respondent only acted as a servant to Paterson, was not Paterson "the person on whose behalf" the sale was made, and therefore the "seller" under s. 17?]

No. Even if the sale be treated as made by the respondent personally, he himself was the person on whose behalf it was made, and he only is responsible under s. 17. He was not an apprentice nor "a servant" of the chemist, within the meaning of the section, but sold the goods for his own advantage and got a commission on the sale. Sect. 17 makes it unlawful to sell arsenic, prussic-acid, strychnine, and other poisons specified in Sched. A. to any person unknown to the seller, unless introduced by some one known to the seller; and the seller must make an entry in a book kept for the purpose of the entry, which must be signed by the purchaser. Those provisions can only be complied with by the seller at the premises where the sale is made, and he therefore must be the "seller" to whom s. 17 applies.

[GROVE, J.:—But the section further enacts that the provisions of this section which are solely applicable to poisons in the first part of Sched. A. to this Act, or which require that the label shall contain the name and address of the seller, shall not apply to articles to be exported from Great Britain by wholesale dealers, nor to sales by wholesale to retail dealers in the ordinary course of wholesale dealing, s. 17.]

Yes. This sale of a pennyworth of poison was by retail, therefore s. 17 applies. The respondent was the seller, his name and

address were not on the packet sold, and he should have been convicted.

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The respondent did not appear.

GROVE, J. This case is important, and I therefore regret that no counsel has argued it on behalf of the respondent. I am of opinion that the magistrates have not drawn the right inferences from the facts, and that the packet of poison was not sufficiently and properly labelled within the meaning of s. 17 of the Pharmacy Act. Light is thrown on the construction of that section by s. 15, which enacts that any person selling or keeping open a shop for retailing, dispensing, or compounding of poisons, not being a duly registered person, shall be subject to certain penalties. The word "sell" there is, in one sense, contradistinguished from the words "keep open a shop," and so possibly may apply to sales which are not in open shop. But the penalties seem to be imposed on the person who conducts the business either of the shop or of the actual selling, and I think the same construction must be put on s. 17, which provides that the box, or wrapper, or cover of the packet containing the poison, shall be distinctly labelled with the name of the article, the word "poison," and the name and address of the "seller." Then who is the "seller"? No doubt difficult questions may arise on any construction of the word, but I am of opinion that in any case within s. 17 the "seller" is the person who actually conducts the business of sale, although not necessarily the person by whose hand the sale is made. For instance, I do not think that the woman who in the present case handed the packet over the counter was the "seller;" nor do I think that the chemist, Paterson, who supplied the poison to the respondent and who lived some considerable distance away can be regarded as the "seller" within the meaning of this section, because, as he did not live or carry on business on the premises, he could not possibly comply with the provisions of the statute. Particulars of the sale of certain poisons must be entered by the seller; but a person living at a distance could not enter them. If the judgment of the magistrates were right a chemist living in one street might employ an unqualified person residing in another street as a commission agent to sell to the public. The object of the Act is

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the protection of the public, and the protection contemplated by Parliament is that the person who controls the sale of poisons shall be a duly qualified person, so that the public may have a remedy against him, and that he shall be responsible for the state of the poisons, preparations, and labels, and for the shop, and have it conducted in his name. Here the chemist whose name is on the packet did not control the sale, he simply supplied the article to the respondent who sold it by retail. I think the word "seller" does not apply to the remote seller, but that the name and address on the label must be that of the person actually conducting the business of the sale. I am therefore of opinion that our answer to the questions of the justices must be in the negative, and that the facts show that the poison was not sufficiently or properly labelled.

LOPES, J. The case depends on the true meaning of the word "seller" in s. 17. It seems clear that the word "seller" as used in that section means the person keeping or controlling the shop or place or carrying on the business where the poison is sold. This construction is consistent with the general policy of the Act, which is to protect the public against the sale of poisons by unqualified persons.

Decision reversed, and case remitted to justices.

Solicitor for appellant: *H. Glaisyer.*

J. R.

[IN THE COURT OF APPEAL.]

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Dec. 3.

HAYWOOD *v.* THE BRUNSWICK PERMANENT BENEFIT BUILDING SOCIETY.

Grant of Land subject to Rent-charge—Covenant by Grantee to build and repair Buildings—Assignment of Land and Rent-charge—Whether Assignee of Land Liable on Covenant to Repair—Notice.

Where land has been granted in fee in consideration of a rent-charge and a covenant to build and repair buildings, the assignee of the grantee of the land is not liable, either at law, or in equity on the ground of notice, to the assignee of the grantee of the rent-charge on the covenant to repair.

Tulk v. *Moxhay* (2 Ph. 774), explained.

Cooke v. *Chilcott* (3 Ch. D. 694), questioned.

APPEAL from the judgment of Stephen, J., on further consideration.

This was an action against a building society, the mortgagees of certain land, upon a covenant to build and keep in repair houses erected upon the land. The facts were these:—

By an indenture dated the 17th of May, 1866, made between Charles Jackson and Edward Jackson, Charles Jackson granted a plot of land to Edward to the use that Edward should pay Charles an annual chief rent of 11*l.*, and Edward for himself, his heirs executors, administrators, and assigns, covenanted with Charles, his executors and assigns, that he Edward, his heirs and assigns, would pay Charles, his heirs and assigns, this rent half-yearly, and would erect and keep in good repair and, when necessary, rebuild, messuages on the land of the value of double the rent. On the 2nd of March, 1867, Charles Jackson conveyed to Haywood to the use of Haywood, his heirs and assigns, the said chief rent and all powers and remedies in respect thereof, together with the benefit of the said covenant. Edward Jackson assigned his interest to MacAndrew. MacAndrew by a deed of the 8th of September, 1871, mortgaged the premises in question to certain persons described as the trustees of the Brunswick Building Society in fee subject to the rent-charge and covenants above-mentioned. The building society was afterwards incorporated under the Act of 1874, and under the mortgage deed took possession of the land and the buildings on

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it. It was conceded on the one hand that buildings of the stipulated value had been erected upon the land, and on the other that they had not been kept in repair, and the question was whether, under the circumstances stated, the building society was liable upon the covenant to keep them in repair. No question arose as to their liability to pay the chief rent, as the arrears were paid into court in the action.

The case was tried before Stephen, J., without a jury, at the Manchester Winter Assizes, 1881, who reserved it for further consideration, and after stating the facts as above, gave judgment as follows:—

The points argued in this case were two. It was affirmed by the plaintiff and denied by the defendants, that the covenant in the deed of 1866 ran with the land, and that Haywood, as assignee of Charles Jackson, could therefore sue upon it the Brunswick Building Society, the mortgagees of the assignee of Edward Jackson. It was also affirmed by the plaintiff and denied by the defendants, that the defendants being in possession of the property with equitable notice of the covenant must perform it.

As to the first part of these arguments, I am disposed to think the case of *Milnes* v. *Branch* (1) is an authority directly in point in favour of the defendants. It is true that Lord St. Leonards appears to disapprove of this decision: 2 Vendors and Purchasers, 14th ed. p. 591, note, but I must regard it as a binding authority till it is overruled.

With regard to the second point, I think that the plaintiff's contention must prevail. The only distinction, on which the defendants relied to take the case out of the ordinary rule as to persons in possession of land being bound to perform covenants relating to it of which they have notice, was that, though an equity to use property or to abstain from using it in a particular way may be so attached to land, a liability to repair or do similar acts cannot. I see no reason for this distinction, and it is directly opposed to the case of *Cooke* v. *Chilcott.* (2)

The result is that there must be judgment for the plaintiff, with costs. There will be no damages, the parties having agreed

(1) 5 M. & S. 411. (2) 3 Ch. D. 694.

that if it is formally decided that the defendants are to put the buildings in repair, they must be repaired to the satisfaction of a gentleman agreed upon.

The defendants appealed.

Ambrose, Q.C., and *Henry* (*Crompton*, with them), for the defendants. First, this covenant does not run with the land for the benefit of the plaintiff as assignee of the rent: *Milnes* v. *Branch* (1); *Randall* v. *Rigby* (2); *Spencer's Case.* (3) The plaintiff is without remedy by action on the covenant, his only remedy is to distrain for the rent, or to re-enter.

Secondly, the burden of the covenant does not run with the land so as to charge the defendants at law as assignees: *Keppell* v. *Bailey* (4); *Brewster* v. *Kitchell* (5); *Spencer's Case.* (6)

Thirdly, the rule of *Tulk* v. *Moxhay* (7) that although a covenant may not be enforceable at law against assignees, it will be enforced against them in equity if they have notice of it, applies to restrictive covenants only, that is to covenants to use or not to use the land in a particular way. Of the fifteen cases in which *Tulk* v. *Moxhay* (7) was applied, *Cooke* v. *Chilcott* (8) is the only instance in which the covenant was not a restrictive one, and there Malins, V.C., was of opinion that the covenant ran with the land; so that it was not necessary in that case to resort to the doctrine of notice. When the case came upon demurrer before the Court of Appeal, there was no decision on the present point, as on the pleadings the defendant had admitted his liability on the covenant, and it was on that ground alone that the Court of Appeal affirmed the decision of the Vice-Chancellor. Moreover, the covenant, which was to supply water to houses on another man's land, had the effect of creating a grant of an easement, and the owner of the dominant estate would be entitled to enforce his right in respect of it without regard to any question as to the burden of the covenant running with the land: Gale on Easements, 5th ed. p. 85, and *Rowbowtham* v. *Wilson.* (9) The dis-

(1) 5 M. & S. 411.
(2) 4 M. & W. 130.
(3) 1 Sm. L. C. 8th ed. at p. 89.
(4) 2 My. & K. 517.
(5) 1 Salk. 198; 5 Mod. 368.
(6) 1 Sm. L. C. 8th ed. at pp. 90, 91.
(7) 2 Ph. 774.
(8) 3 Ch. D. 694.
(9) 8 H. L. C. 362.

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tinction between restrictive and affirmative covenants, and that the latter will not be enforced by injunction (the party complaining being left to his remedy in law for damages), is clearly shewn in *Lumley* v. *Wagner*. (1) Lord Thurlow, in *Lucas* v. *Commerford* (2), supposed that an equitable mortgagee by deposit of a lease was liable to perform the covenants, but that was overruled by *Moore v. Greg* (3), and it has been now decided that an agreement to take a lease followed by possession is not sufficient to give the intended lessor a right to sue the assignee in equity on the covenants in the lease: *Cox* v. *Bishop*. (4) In *Wilson* v. *Hart* (5), *Whatman* v. *Gibson* (6), and *Thornewell* v. *Johnson* (7), the covenants were restrictive.

[They also argued that there was not sufficient evidence to justify the finding that the defendants were in possession, and further, that the trustees of a building society were not authorised to take a mortgage which would involve a liability such as the plaintiff sought to impose, and that being therefore ultrà vires, the trustees personally, and not the society, would be liable.]

Addison, Q.C., and *R. H. Collins*, for the plaintiff. [They argued that there was evidence of the defendants having entered into possession, and the Court relieved them from arguing that the trustees of the society had acted ultrà vires.]

Then the defendants, having taken possession with notice of this obligation affecting the land, are bound to perform it. It is said that that liability is limited to the performance of such covenants as restrict the use of the land. That is not so, for there are several cases in which a Court of equity has enforced affirmative covenants: *Luker* v. *Dennis* (8); *Wolverhampton and Walsall Ry. Co.* v. *London and North Western Ry. Co.* (9); *Storer* v. *Great Western Ry. Co.* (10); *Wilson* v. *Furness Ry. Co.* (11); *Lane* v. *Newdigate* (12) and *Morland* v. *Cook*. (13) The decision in *Keppell*

(1) 1 De G. M. & G. 604.
(2) 3 Bro. C. C. 166.
(3) 2 Ph. 717.
(4) 8 De G. M. & G. 815; 26 L. J. (Ch.) 389.
(5) Law Rep. 1 Ch. 463.
(6) 9 Sim. 196.
(7) 50 L. J. (Ch.) 641.
(8) 7 Ch. D. 227.
(9) Law Rep. 16 Eq. 433.
(10) 2 Y. & C. Ch. 48.
(11) Law Rep. 9 Eq. 28.
(12) 10 Ves. 192.
(13) Law Rep. 6 Eq. 252.

v. *Bailey* (1), so far as it is a decision that an affirmative covenant as to the use of the land is not binding in equity on the assignee with notice, has been overruled by more recent cases, as appears from the observations of Knight Bruce, L.J. in *De Mattos* v. *Gibson*. (2) In *Greaves* v. *Tofield* (3), James, L.J., in the course of his judgment says: "A purchaser, mortgagee, or creditor, is still liable to be affected by notice of any other incumbrance than an annuity, he is still liable to be affected by notice of any agreement for a lease, by notice of any contract affecting the use of the land, as for instance a covenant like that in *Tulk* v. *Moxhay*." (4) The cases of *Aspden* v. *Seddon* (5) and *Daniel* v. *Stepney* (6), shew that an assignee with notice takes the benefit with the burden. *Milnes* v. *Branch* (7) it must be admitted is against the plaintiff, but it is doubtful whether that case would be considered to be now law, and Lord St. Leonards, in his comments upon it, was of opinion that the covenant might well run with the rent in the hands of an assignee: Sugden's Vendors and Purchasers, 14th ed. p. 591.

[They also cited *Bally* v. *Wells* (8) and *Western* v. *Macdermott*. (9)]

Ambrose, Q.C., in reply.

Dec. 3. BRETT, L.J. This appeal must be allowed. I am clearly of opinion, both on principle and on the authority of *Milnes* v. *Branch* (10), that this action could not be maintained at common law. *Milnes* v. *Branch* (10) must be understood, as it always has been understood, and as Lord St. Leonard's (11) understood it, and it will be seen, on a reference to his book, that he considers the effect of it to be that a covenant to build does not run with the rent in the hands of an assignee.

This being so, the question is reduced to an equitable one. Now the equitable doctrine was brought to a focus in *Tulk* v. *Moxhay* (4), which is the leading case on this subject. It seems

(1) 2 My. & K. 517.
(2) 4 De G. & J. 276, 282.
(3) 14 Ch. D. 563, at p. 573.
(4) 2 Ph. 774.
(5) 1 Ex. D. 496.
(6) Law Rep. 9 Ex. 185.
(7) 5 M. & S. 411.
(8) 3 Wils. 25.
(9) Law Rep. 1 Eq. 499.
(10) 5 M. & S. 411.
(11) Sug. V. & P. 14th ed. p. 590.

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to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced. It may be also, but it is not necessary to decide here, that all covenants also which impose such a burden on the land as can be enforced against the land would be enforced. Be that as it may, a covenant to repair is not restrictive and could not be enforced against the land; therefore such a covenant is within neither rule. It is admitted that there has been no case in which any Court has gone farther than this, and yet if the Court would have been prepared to go farther, such a case would have arisen. The strongest argument to the contrary is, that the reason for no Court having gone farther is that a mandatory injunction was not in former times grantable, whereas it is now; but I cannot help thinking, in spite of this, that if we enlarged the rule as it is contended, we should be making a new equity, which we cannot do.

I think also that *Cox* v. *Bishop* (1) shews that a Court of equity has refused to extend the rule of *Tulk* v. *Moxhay* (2) in the direction contended for, and that if we decided for the plaintiff we should have to overrule that case. But it is said that if we decide for the defendants we shall have to overrule *Cooke* v. *Chilcott.* (3) If that case was decided on the equitable doctrine of notice, I think we ought to overrule it. But I think there is much to shew that the ground of the decision was that Malins, V.-C., was of the opinion—wrongly as it now turns out—that the covenant ran with the land, and the decision of the Court of Appeal appears to have proceeded on an admission.

COTTON, L.J. I am of the same opinion on both points. I think that a mere covenant that land shall be improved does not run with the land within the rule in *Spencer's Case* (4) so as to give the plaintiff a right to sue at law. I also think that the

(1) 8 De G. M. & G. 815; 26 L. J. (Ch.) 389.
(2) 2 Ph. 774.
(3) 3 Ch. D. 694.
(4) 1 Sm. L. C. 8th ed. at p. 89.

plaintiff has no remedy in equity. Let us consider the examples in which a Court of Equity has enforced covenants affecting land. We find that they have been invariably enforced if they have been restrictive, and that with the exception of the covenants in *Cooke* v. *Chilcott* (1), only restrictive covenants have been enforced. In *Tulk* v. *Moxhay* (2), the earliest of the cases, Lord Cottenham says, "That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using it in a particular way, is what I never knew disputed." In that case the covenant was to use in a particular manner, from which was implied a covenant not to use in any other manner, and the plaintiff obtained an injunction restraining the defendant from using in any other manner, although the covenant was in terms affirmative. At p. 778, Lord Cottenham says, "If an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." This lays down the real principle that an equity attaches to the owner of the land. It is possible that the doctrine might be extended to cases where there is an equitable charge which might be enforced against the land, but it is not necessary to decide that now; it is enough to say that with that sole exception the doctrine could not be farther extended. The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing which would justify us in going that length. We are not bound here by *Cooke* v. *Chilcott* (1), and I do not think that the rule of *Tulk* v. *Moxhay* (2) can be extended as Malins, V.-C., there extended it. In *Morland* v. *Cook* (3), there are perhaps some expressions of Romilly, M.R., which favour the opposite contention, but the fact of there being a deed of partition in that case makes it distinguishable. That is the only case besides *Cooke* v. *Chilcott* (1) at all in favour of the plaintiff. *Cox* v. *Bishop* (4) is distinctly the other way. There the covenants affected the owner, but not the land, and although the defendant was full equitable owner the Court refused an injunction. *Daniel* v.

(1) 3 Ch. D. 694.
(2) 2 Ph. 774.
(3) Law Rep. 6 Eq. 252.
(4) 26 L. J. (Ch.) 389.

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Stepney (1), where there was merely a grant of a rent to be distrained for on land adjoining the land demised, does not seem to me to be in point, and such observations of Bramwell, B., in *Aspden* v. *Seddon* (2) as might possibly assist the plaintiff are extra judicial. There is therefore no ground for extending the equitable doctrine as we are asked to do.

LINDLEY, L.J. I am of the same opinion. The practical question is, whether the defendants, being mortgagees in possession, are bound to repair under the circumstances of the case. It is said that the obligation to repair is imposed upon them because they took a conveyance of the land with notice of the covenant, and Stephen, J., has thought himself bound by *Tulk* v. *Moxhay* (3) and *Cooke* v. *Chilcott.* (4)

Now I may first say that I do not think that the defendants could be hit by any process of circuity of action. As mortgagees they took the land subject to the rent-charge no doubt, so far as the liability to distress and re-entry were concerned. I do not think that either covenant runs with the land. Neither *Milnes* v. *Branch* (5), nor *Randall* v. *Rigby* (6), however, apply very closely. In *Milnes* v. *Branch* (5) the plaintiff was not assignee in fee of the rent, having only a leasehold interest in that rent. In *Randall* v. *Rigby* (6) the question was whether debt or covenant was the proper form of action. There are dicta in the judgments, however, which favour the contention of the defendants in this case, and it is impossible not to see that the burden of the covenant does not run with the land. This is not a case of landlord and tenant: we must never lose sight of that distinction.

With regard to the question of notice, *Tulk* v. *Moxhay* (3) shews that a restrictive covenant will be enforced, and so do *Cox* v. *Bishop* (7) and *Wilson* v. *Hart.* (8) But I think that the result of these cases is that only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice. Especially does this appear from

(1) Law Rep. 9 Ex. 185.
(2) 1 Ex. D. 496.
(3) 2 Ph. 774.
(4) 3 Ch. D. 694.
(5) 5 M. & S. 411.
(6) 4 M. & W. 130.
(7) 8 De G. M. & G. 815; 26 L. J. (Ch.) 389.
(8) Law Rep. 1 Ch. 463.

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Wilson v. *Hart* (1), where a covenant not to use a house as a beershop was enforced against a purchaser's tenant from year to year. It is absurd to suppose that such a tenant could have been compelled to perform a covenant to repair.

The principle of *Cooke* v. *Chilcott* (2) may or may not be applicable to this case, but the circumstances were wholly different. I should be sorry to overrule that case, and prefer to leave it to be reconsidered on some future occasion. It is enough to say that in the present case we have been asked to extend *Tulk* v. *Moxhay* (3) as it has never been extended before, and we decline to do so.

Appeal allowed.

Solicitors for plaintiff: *Chester & Co., for James Gardner, Manchester.*

Solicitors for defendant: *Le Riche & Son, for R. W. Stead, Manchester.*

J. E. H.

THE QUEEN *v.* BAYLEY.
IN THE MATTER OF MASON *v.* AIRD.

1882
Feb. 20.

County Court—Action transferred from Divisional Court—Power to stay Proceedings—30 & 31 *Vict. c.* 142, *s.* 10.

Where an action, commenced in the Divisional Court, has been transferred to a county court under 30 & 31 Vict. c. 142, s. 10, the county court judge has power to make an order staying the proceedings until the plaintiff has paid the costs of a previous action brought by him in the Divisional Court against the same defendant.

RULE calling on the county court judge of Middlesex, holden at Westminster, to shew cause why he should not proceed to hear and determine this action.

It appeared that the action was for libel, and had been transferred from the Divisional to the county court under 30 & 31 Vict. c. 142, s. 10. The plaintiff had previously commenced an action in the Queen's Bench Division which involved substantially the same question, and which after a second trial ended in judg-

(1) Law Rep. 1 Ch. 464. (2) 3 Ch. D. 694.
(3) 2 Ph. 774.

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ment for the defendant. The plaintiff had never paid the defendant's costs in this action, and upon this fact being brought to the notice of the county court judge he made an order staying all proceedings in the second action until the costs of the first action were paid by the plaintiff.

Anderson (*Sir H. Giffard, Q.C.*, with him), shewed cause, but was stopped.

Melsheimer, in support of the rule. The action is transferred to the county court judge by virtue of an order calling upon him to try the case, and this order cannot be disobeyed. Conceding that he could make an order for particulars and upon non-compliance with it order the proceedings to be stayed, such an order would be founded upon matters arising in the county court proceedings, and not as here in consequence of what has occurred in an action brought in another court.

FIELD, J. I think this rule must be discharged. The action, which was for libel, had been transferred to the county court, and the judge of that court in the exercise of his discretion made an order staying the proceedings until the costs of an action, which the plaintiff had previously brought against the defendant in the Divisional Court, and which involved substantially the same question as the present one, had been paid.

It is unnecessary for us to go into the merits of the case, the sole question being whether the judge went beyond his jurisdiction, and it must at once be observed that there is a distinction between the powers of the county court in this case and in those where the action is ordered to be tried in the county court under 19 & 20 Vict. c. 108, s. 26. There the record is kept in the superior courts, who receive from the registrar of the county court a certificate of the result of the trial, and a motion for a new trial is made and the costs taxed in this Court. Here, under 30 & 31 Vict. c. 142, s. 10, the proceedings are different. The action is in fact transferred to the county court, and the plaintiff has to lodge the original writ and the order removing the action with the registrar, so that the county court judge has practically the same powers as if the action had been commenced in his court. Now

can it be doubted that if the plaintiff here had brought both his actions in the county court the judge could have stayed proceedings in the second action? If he had been a mere commissioner selected by this Court to try an action it may well be that he would have had no such power. It is admitted that after the order transferring the action an application to stay the proceedings could not be made to this Court, and that it would therefore be necessary, if neither Court had the power to stay the proceedings, first to apply for a certiorari to bring back the case to this Court, and then to make a second application to stay the proceedings. I cannot believe that this was ever intended.

HUDDLESTON, B. I am of the same opinion. The legislature, in cases under 30 & 31 Vict. c. 142, has carefully and elaborately made provisions for transferring the whole action to the county court.

BOWEN, J. I am of the same opinion. The only doubt which I have felt is whether the power given to the county court judge in a case like this was not limited to orders for expediting rather than arresting the proceedings. But, although my final opinion is not so clear as that of my learned Brothers, I am not prepared to dissent from them, more especially as the county court judge appears to have exercised his discretion in a very proper manner.

Rule discharged.

Solicitors for plaintiff: *Smith & Howard.*
The defendant in person.

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Dec. 6.

[IN THE COURT OF APPEAL.]

ERICHSEN, REPRESENTATIVE OF THE LONDON AGENCY OF THE GREAT NORTHERN TELEGRAPH COMPANY OF COPENHAGEN, APPELLANTS; LAST, RESPONDENT.

Inland Revenue—Income Tax—Foreign Telegraph Company—Marine Cables—Exercising Trade in England—Messages forwarded from England to remote parts of the World—16 & 17 *Vict. c.* 34; 5 & 6 *Vict. c.* 35.

The appellants, a foreign company domiciled in Copenhagen, had three marine cables in connection with Aberdeen and Newcastle, communicating with the telegraph lines of the Post Office in the United Kingdom. They had also work-rooms with clerks in London, Newcastle, and Aberdeen. Messages from this country were forwarded over the lines of the Post Office and the cables of the appellants to Denmark, and thence by their wires and the wires of foreign governments to Russia, China, Japan, and India. The total charges paid for transmitting such messages were collected by the Post Office, and, after deducting their dues, handed to the appellants who retained the amount due to them for the transmission of messages over their cables and lines, and paid the residue to the various Governments and companies respectively entitled to it. No profits were made by the appellants from the transmission of messages over the land lines in the United Kingdom:—

Held, affirming the decision of the Queen's Bench Division, that the appellants must be taken to exercise a trade in the United Kingdom under 16 & 17 Vict. c. 34, s. 2, Sched. D, and that they were chargeable to income tax on the balance of profits or gains from their receipts in this country from the transmission of messages.

APPEAL from a decision of the Queen's Bench Division in favour of the CROWN, on a case stated under 37 Vict. c. 16, s. 9.

The questions were whether the Great Northern Telegraph Company, which was a foreign telegraph company established at Copenhagen, exercised a trade within the United Kingdom, and, if so, what was the profit arising therefrom in respect of which the company was taxable under the Income Tax Act (16 & 17 Vict. c. 34), s. 2.

The company had three marine cables in connection with the United Kingdom, two at Newbiggin near Newcastle, which were worked by the company's servants at Newcastle, and one at Peterhead, Scotland, which was worked by the company's servants at Aberdeen, and it had also a London office, where it took messages. Messages were taken and sent for the company from all parts of the United Kingdom through their marine cables to

Denmark, and from thence to various distant foreign places over cables belonging to the company, as well as over cables belonging to various other companies. By an arrangement with the Post-master-General, messages from all parts of the United Kingdom to the company's stations at Newbiggin and Peterhead were received by and transmitted through the Post Office, and no profits were made by the company from the transmission of messages over the land lines in the United Kingdom.

The Queen's Bench Division held that the company exercised a trade in the United Kingdom, and that it was liable to income tax on the profit arising from such trade, such profit being the difference between the sums received in the United Kingdom for the transmission of messages, and the cost of such transmission without deduction for the trade profit from the use of the company's own cables abroad.

The company appealed.

The facts and the arguments are stated in the report of the case in the Queen's Bench Division. (1)

Sir H. Giffard, Q.C., and *A. M. Bremner*, argued for the company.

Sir F. Herschell, S.G., and *A. V. Dicey*, appeared for the Crown, but were not called upon.

JESSEL, M.R. The present appeal is from the decision of the Divisional Court, which decided in effect two things—the first was, that the appellant company carry on trade within the United Kingdom. The words of the Act are not quite those, but are "any trade" "exercised within the United Kingdom." (2) Whatever the word "exercised" may mean, it certainly includes carrying on, and therefore carrying on trade is within that word. The second point decided was, that the profits of that trade are subject to income tax wherever the expenses may be incurred, and whether they are incurred by reason of the company carrying on

(1) 7 Q. B. D. 12.

(2) By 16 & 17 Vict. c. 34, s. 2, Schedule D, the duties are to be, inter alia, "For and in respect of the annual profits or gains arising or accruing to any person whatsoever, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom."

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trade along cables belonging to themselves, or along cables belonging to anybody else, or, to put the point rather more distinctly, that the company are not to be allowed to deduct from the profit any imaginary or estimated profits which would be obtained by the company if they carried the message along their own cables abroad.

The facts, as I understand them, are clear enough, and the question is whether what the company do amounts to carrying on trade in the United Kingdom. There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things. Now this company are a foreign corporation established at Copenhagen, but they have an agent and an office here, and being a telegraph company they have at Newbiggin near Newcastle, the ends of two cables, which are worked by a staff of servants at Newcastle, and they have a third cable at Peterhead, in Scotland, which is worked by a staff of servants at Aberdeen, and they have also workrooms in Winchester Street, in London, and they employ in these places about forty clerks and electricians, whom they pay. Therefore there is a telegraph company with telegraph stations in this kingdom, and with the ends of the cables in this kingdom, which are worked by their own staff, and they transmit messages from England to distant foreign parts. The way they do so is this: they have a chief office in London where they take in messages direct. All over the kingdom they take messages through the Post Office, having an arrangement with the Postmaster-General by which he deducts what he is entitled to receive for the transmission of the message to the company's outlying stations, that is, the one at Peterhead and the one at Newbiggin, and he hands them the rest. Now that, as it appears to me, is a perfectly plain case of carrying on trade in this country. The company habitually receive money in this country from English subjects for messages sent from England to places abroad, and they transmit those messages from stations in this country to places abroad. This, I think, makes it a carrying on of trade in this country.

A company in this country who regularly undertake the carriage of goods abroad for money as part of their ordinary business, carry on trade in this country, although the whole of the carriage is done abroad. The mere fact that they enter into contracts in this country with English subjects for the right of carriage, appears to me to be the same thing as if they were to make similar contracts for the sale of goods. Whether it is the right of carriage or the right to transmit a message, appears to me to make no difference. Again, if a railway company with a station at Dover and a station at Calais were to carry passengers from Dover to Calais as a regular practice, that, I think, would be a trading in Dover, so far as regarded the passengers carried from Dover to Calais. Therefore, in the present case, there is a trading within the meaning of the statute.

The next point is the question of profits. Now what is profit? It is, as I understand, the difference between the price received on a sale and the cost price of what is sold. There may be the expense of management or of the establishment in which the profit is earned, but that is only an element in the cost price. The difference between money received for goods sold and money received for messages is to my mind inappreciable. One must take the money received and deduct from that what it costs the company to transmit the messages, and the difference is the profit, and upon that difference the company ought to be taxed. But then it is said that the profit is earned in this way: The company have abroad cables belonging to them which are not connected with this country directly (there being foreign cables intervening between the company's cables abroad and the cables connected with this country), and that those cables are used by them to convey the messages and so earn the profit, and that that profit ought to be deducted. The answer is, that those cables do not earn a profit. The use of them by the company may diminish the expense of earning a profit, and therefore diminish the cost price, that is to say, the cost of transmitting the message abroad, but it is a fallacy to say that those cables earn a profit. Consequently the company can only deduct from the price received the cost of transmitting the message. It seems to me, therefore, that the decision of the Court below is correct and ought to be affirmed.

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BRETT, L.J. By the statute it is enacted that there shall be levied for the use of her Majesty the duties, amongst other things, for and in respect of the annual profits or gains accruing to any person, whether subject of her Majesty or not although not resident within the United Kingdom, *from any trade exercised within the United Kingdom.* It seems to me that there is no difficulty as to the construction of the Act of Parliament. If any person, whether a foreigner or native or subject, receives annual profits or gains, in respect of a trade which is exercised in this country, then that person is subject to the duty. The difficulty, if any, is not in the construction of the Act of Parliament, but in determining whether in the present case there are gains accruing to this foreign company in respect of a trade which they carry on in this country. I think it would in the first place be nearly impossible, and secondly wholly unwise, to attempt to give an exhaustive definition of what is a trade exercised in this country. The only thing that we have to decide is whether, upon the facts of this case, this company carry on a profit earning trade in this country. I should say that wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad. In the present case the company would not have any such contract as they are in the habit of making, unless it was a contract made in England with a person who is in England, because otherwise such person would not be wanting to send a telegraphic message from England, and it is the payment under such a contract out of which the profit is to come. Therefore, it seems to me, that in this case it is immaterial to consider whether any part of that which the company undertake to do is to be done in England or not. That which is done by them occasions cost, and is no part of the profit, but diminishes the profit. The expense of all that is done under the contract, must be deducted from what is paid to the company under the contract in order to get the profit. The contracts are made and habitually made with the company in England and, therefore, it

seems to me that the company carry on in England the trade or business of making such contracts. Then from what is the duty to be collected? It is from the profit accruing to this company from the trade which they carry on in England, namely, the making such contracts, and that profit is the difference between the sum the company receive and what it costs to earn that sum. There is no difficulty about that. It is immaterial whether the company have expended in this country or abroad what it properly can be said to cost them in order to earn the money which they so receive, but such expense, and nothing more, must be deducted in order to get the profit. If every part of the whole machinery for the conveyance of the messages belonged to the company, it would cost the company a sum to maintain it, and the profit would be the difference between the amount paid under the contract, by the person sending the message, and what it cost the company to carry the message. If instead of doing themselves the carriage of the message abroad, the company employ somebody else to do it, what they pay such person for doing this, and which includes, no doubt, the ordinary trade profit of such person, is the cost of the company in the carriage, but if the company were to do this themselves the trade profit on it would be no part of the cost, because if one might deduct the trade profit, one would deduct the whole, and so it might be said the company made no profit at all. It is obvious therefore to me that the company cannot, in respect of any part of the line which they have abroad, deduct not merely what it would cost the company to maintain it, but what is called trade profit. Consequently both points must be decided here against the company, and in favour of the Crown.

COTTON, L.J. The questions here are first, whether in fact this company exercise a trade within the United Kingdom within the meaning of the provisions of this Act, and secondly, what amount of profit is taxable.

This is a company which have their principal place of business in Copenhagen, and carry on business there; but they have an office and servants in London, and at that office by their own servants, and at various post offices throughout the kingdom by

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arrangement with the Postmaster General, by the post office clerks, they receive for transmission to various parts of the world telegraphic messages, which they contract to so transmit, and they habitually do this, and in my opinion when a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business. In this case the trade or business which the company carry on is that of collecting messages for transmission to various parts of the world, and although the company have their principal place of business, and I will assume their management, at Copenhagen, still, in my opinion, they carry on or exercise their trade or business within the United Kingdom. With reference to the argument which was much pressed upon us by Mr. Bremner, that a company does not carry on its business except where its place of management is, I wish to say that, however true that may be as regards the meaning of the words "carry on, or exercise business" in some Acts of Parliament, it is not the true interpretation of those words in this Act of Parliament, where the object is not to see where a company is to be sued, but what duty on profits it is to pay in this country. Then as to the question on what profit the company are to pay? The question is, what profit they make by the business carried on here, which is contracting to send messages to various parts of the world. It is, in my opinion, the sum received, after deducting everything which the company pay for the purpose of performing their contract. If part is performed by the company themselves, they cannot deduct anything in respect of a profit supposed to have been earned by them in the course of such performances. They can, of course, deduct all expenses, including their own expenses, and sums paid to other companies, but they cannot deduct a profit which is imaginary and has no real existence.

Judgment affirmed.

Solicitors for appellants: *Ashurst, Morris, Crisp, & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. P.

[IN THE COURT OF APPEAL.]

1881
Dec. 6.

THE YORKSHIRE FIRE AND LIFE INSURANCE COMPANY, APPELLANTS; CLAYTON, RESPONDENT.

Inland Revenue—Inhabited House Duty—Dwelling-house let in different Tenements—41 Vict. c. 15, s. 13.

By 41 Vict. c. 15, s. 13, where any house being one property is divided into and let in different tenements, and any of such tenements are occupied solely for the purpose of any trade or business or of any profession or calling, by which the occupier seeks a livelihood or profit, or are unoccupied, inhabited house duty is to be assessed as if the house comprised only the tenements other than those so occupied as aforesaid, or unoccupied; and a house or tenement occupied solely as aforesaid is exempt, although a servant or other person may dwell in such house or tenement for the protection thereof.

A house had one entrance into the street, and the rooms in it opened on a hall, passages, and staircase, common to all the tenants. Some of the rooms on the ground floor were occupied by the landlords, the appellants, as offices, and the remainder, and the rooms on the first floor, were let to tenants who occupied them as offices. The rooms on the second floor were occupied partly by tenants who resided, and the remainder by a care-taker and his wife, who acted as servants to the residents and cleaned the several portions occupied by the appellants as offices or let off. The appellants claimed relief from being assessed on the portions used as offices:—

Held, affirming the decision of the Queen's Bench Division, that the portions so used were not exempt, as the exemption applies to houses let in separate and distinct tenements each complete in itself, and not to rooms in a house.

APPEAL from a decision of the Queen's Bench Division in favour of the Crown, on a case stated under 37 Vict. c. 16, s. 9.

The material facts and the 13th section of 41 Vict. c. 15, on the construction of which depended the question as to the liability of the appellants to be assessed to the inhabited house duty, are fully stated in the report of the case in the Queen's Bench Division (1), and for the purpose of the present report they sufficiently appear in the headnote.

Lumley Smith, Q.C., and *Bigham*, for the appellants. The house of the appellants is "divided into and let in different tenements" within the meaning of 41 Vict. c. 15, s. 13, and therefore the appellants ought to have the relief from assessment

(1) 6 Q. B. D. 557.

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to the inhabited house duty given by that section in respect of any of such tenements as are occupied solely for the purposes of trade or profession. It is contended on behalf of the Crown that to constitute the dividing of a house into tenements within the meaning of this section there must be a structural division, and that the section was enacted to meet such cases as those of *Rusby* v. *Newson* (1) and the *Attorney General* v. *Mutual Tontine Westminster Chambers Association.* (2) That contention is erroneous, structural severance is not required, and it is sufficient if the rooms are separately held so as to give the occupier exclusive possession and complete control over them, as pointed out by Blackburn, J., in *Reg.* v. *Assessment Committee of St. George's Union* (3) and in *Allan* v. *Overseers of Liverpool.* (4) No doubt in *Chapman* v. *Royal Bank of Scotland* (5) the Divisional Court considered that this 13th section only applied where the tenements were structurally severed, but that case followed the decision of the Divisional Court in the present case, which is the subject of this appeal. It is said also on the part of the Crown that this section does not apply to the present case, because the appellants, who were landlords of the house, kept a portion of it for their own use, which they occupied as offices. On this point the Court below were divided, and the opinion of Hawkins, J., in *Chapman* v. *Royal Bank of Scotland* (5), is in the appellants' favour.

Sir F. Herschell, S.G. (*A. V. Dicey*, with him), for the respondent. The legislature has used the word "divide" as well as "let," and mere letting does not divide.

He was then stopped by the Court.

JESSEL, M.R. This is one of those cases which is fairly open to argument, but the question is, whether we can properly overrule the Court below in the interpretation which has been put on s. 13 of 41 Vict. c. 15. That section standing alone would not be easy to construe, but having regard to previous legislation and to the previous course of decisions, I think we can fairly

(1) Law Rep. 10 Ex. 322.
(2) Law Rep. 10 Ex. 305; 1 Ex. D. 469.
(3) Law Rep. 7 Q. B. 90, at p. 100.
(4) Law Rep. 9 Q. B. 180.
(5) 7 Q. B. D. 136.

put a construction on it substantially the same as that which was adopted by Lindley, J., in his judgment in the Court below. Under the old Acts an entire house occupied for business or trade purposes only was exempt from duty; afterwards an entire house occupied for professional purposes was also exempt, and by the 6th rule of schedule B of 48 Geo. 3, c. 55, there was this: "Where any house shall be let in different storeys, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to and shall in like manner be charged with the same duties as if such house or tenement was inhabited by one person or family only." Now the word "tenement" there means "house," because what the legislature is speaking of is a house let in different storeys. The rule concludes thus: "And the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged with such duties." The first question to decide is, what is the meaning of the words "let in different storeys, tenements, lodgings, or landings?" Now one can give a different meaning to each of these words. A "tenement" means, I think, a separate house. In Tomlins's Dictionary it is stated "tenement signifies properly a house or homestead, but more largely it comprehends not only houses but corporeal inheritances which are holden of another, and all inheritances issuing out of or exercisable with the same." It is obvious that its second meaning cannot be the one intended in the 13th section and in this 6th rule. It must therefore mean what is in law a house, although it is in fact part of a house, of which an illustration is given in *Evans and Finch's Case* (1), in the time of Charles I., where a tenement was held in law to be a house although it was really a set of chambers in a house in the Temple. That being so, I understand "tenement" in this 6th rule of 48 Geo. 3, c. 55, to mean a legal house as distinguished from an ordinary house, and which may be divided into storeys, or may be only part of a storey. A landing is a different thing; it is generally only a portion of a storey, but it may be between two storeys and be no portion of a storey at all. Therefore there are words in this 6th rule which are quite distinct. Then, that being so, there comes the statute 41 Vict.

(1) Cro. Car. 340.

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c. 15, following the case of *Attorney General* v. *Mutual Tontine Westminster Chambers Association* (1), which decided that although a large house was divided into several legal houses the large house was taxable as one house. That Act, as alleged by the Crown, and, I think, rightly, was passed to get rid of the hardship caused by that decision. If it was intended to go further, and to say that every part of a house, although not in itself a separate house, in law should be exempt, I do not see on what principle the owner of a house who occupied the lower part for business purposes and the upper part as a residence, should not be exempted to the extent to which the house was occupied for business purposes. Again, having before one the 6th rule of the schedule to the Act of 48 Geo. 3, c. 55, one cannot help noticing that the words "storeys, lodgings, or landings," are not repeated in the latter part of the rule, but the words are only "house or tenement." Now what are the words of the 13th section on which this question arises? They are,—"where any house being one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purpose of any trade or business or of any profession or calling by which the occupier seeks livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice" as there stated, and then the tax is to be remitted. It appears to me that the argument of the appellants entirely throws aside the word "divided," and although it may not always be possible to give a meaning to every word used in an Act of Parliament, yet as a general rule it is right not to treat words as surplusage if a meaning can be fairly given to them. Now a meaning can be fairly given to the word "divided" if the word "tenement" be read not as that which is held in tenure, but as that which in law is a house, and if it be so read the whole enactment becomes perfectly intelligible. Formerly houses were built so that each house occupied a separate site, but in modern times a practice has grown up of putting separate houses one above the other. They are built in separate flats or storeys, but for all legal and ordinary purposes they are separate houses. Each is separately let and separately occupied, and has no con-

(1) 1 Ex. D. 469.

nection with those above or below, except in so far as it may derive support from those below instead of from the ground, as in the case of ordinary houses.

The legislature evidently intended to extend the same class of taxation to this new sort of houses as applied to houses built in the old style. This, as it appears to me, is the reasonable construction of the section, and one which both gives a meaning to every word and fairly carries out the object of the legislature, which I think we should entirely frustrate if we gave the enlarged meaning to the section that is suggested on the part of the appellants.

For these reasons, I think the decision of the Queen's Bench Division was right and ought to be affirmed.

BRETT, L.J. I think that the right mode of reading the first part of this 13th section is as if it was thus written: "Where any house being one property shall be divided into different tenements and let in different tenements," and the other stipulations are fulfilled, then the result shall take place. The section is, "Where any house shall be divided into different tenements," and it is not "where any house shall be divided into different houses," and the first thing one has to consider is why this distinction and what is the meaning of the word "house," and what is the meaning of the word "tenement?" The word "house" must mean here a house which can be divided into different tenements, and I think the word "tenements" is used in order to comprise the different kinds of things into which a house may be divided, and lest if the word "house" instead of "tenements" had been used, it might have been said the section would not apply to shops, offices, or warehouses, into which a house that can be divided might be divided, since shops, offices, or warehouses are in ordinary parlance known by those names, and are not houses.

What then we have first to construe are the words "shall be divided into different tenements." It seems to me that they mean where the tenement which is part of the house is so structurally arranged that it may be used or actually occupied, as people in ordinary parlance would say, as a man's own house, office, shop,

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or warehouse. It is not sufficient to fulfil this statute that the house is divided into different tenements, it must also be let in different tenements. The former refers to structural arrangements; the latter to the mode of dealing with it when so divided. It might have been difficult to have come to this conclusion if one had not known the state of the law as to taxation of houses at the time this statute was enacted, but it is a well known rule or canon of construction that in construing an Act of Parliament one ought to take into account the state of the law and of judicial decisions at the time the Act is passed. Now, in the case of *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (1), which is a decision of this Court, and therefore its authority cannot be here disputed, it was held that, although by structure each flat of the building could be used as a separate house, and although by the letting each part of it was so used and let as a separate house, yet nevertheless, for the purpose of the inhabited house duty the whole building was considered as one house, and that, notwithstanding that for the purposes of registration and of the franchise each of the flats was deemed to be a separate house. Looking at that decision, and applying the words of this 13th section of 41 Vict. c. 15, to that state of the law, it seems to me clear that such section was enacted in order to meet such a case as that and to alter the law in that respect. But if you try, as has been tried here, to carry it beyond that, you are immediately driven, as has been already shewn, to strike the word "divided" out of this section. That would be contrary to the well-known rule of construction, unless from necessity one would be obliged to do so, which is not the case here. Therefore, one must give a meaning to the word "divide," and that meaning is satisfied by applying the section to such a case as chambers in the Temple or the flats in Victoria Street. It may also apply to other cases which it is not necessary now to decide, but the question is whether it applies to the case now before us, which is that of a house which is not at all different in structure and arrangement from any ordinary house, and therefore, if the Act of Parliament applies to this house, it must apply to every house, and the word "divided" in the section will have no meaning.

(1) Law Rep. 10 Ex. 305; 1 Ex. D. 469.

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I therefore am of opinion, that there can be no exemption from the duty in this case, and that the judgment should be affirmed.

COTTON, L.J. I am of the same opinion. The first question one has to consider is whether these words "where any house shall be divided into and let in different tenements," require that there should be some physical division as would make the separate portions of the house capable of being treated as separate tenements, or whether a separate letting would be sufficient to satisfy the words of the Act. To hold that such letting would be sufficient would be to alter entirely the words of this section and to depart from the rule of construction which is to give the ordinary meaning to every word, if such meaning can be given. I think, therefore, that these words in the section are not satisfied by a house being let in separate holdings without structural division. If it had been the intention of the legislature to meet such a case as that it would have been easy to say "where a house being one property shall be let in separate portions," but that is not what the section says. Then what is the meaning of "shall be divided into different tenements?" if it is to mean something different from separate lettings. Without dealing with all possible cases, it is sufficient to say that here there is no division of the house at all, except that which exists in all houses which have different floors and separate rooms; and therefore in my opinion this house is not within the exemption.

Judgment affirmed.

Solicitors for appellants: *Bell, Brodrick, & Gray.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. P.

1882
Feb. 23.

TOKE *v.* ANDREWS.

Practice—Pleading—Reply—Counter-claim and Set-off in Reply—Judicature Act, 1873, *s.* 24, *sub-ss.* 3, 7—*Order XIX., rr.* 3, 19; *Order XX., r.* 1.

11 QBD 466
1454 Ch.

A plaintiff may, in his reply to a counter-claim of the defendant, counter-claim in respect of a cause of action accrued after the issue of the writ, but arising at the same time and out of the same transaction as the counter-claim of the defendant.

THIS was a motion to rescind an order of Mr. Justice Williams dismissing an application to strike out matter alleged by the plaintiff in his reply, in answer to a counter-claim by the defendant, on the ground that it was embarrassing to the fair trial of the action within Order XXVII., rule 1. (1)

The plaintiff was the assignee of the reversion upon a tenancy by the defendant of certain lands, woods, and hereditaments, which tenancy was at the time of the commencement of the action about to determine on the then next 29th of September, and he brought his action to recover rent (446*l.* 17*s.* 3*d.*) in arrear at Midsummer, 1881, the writ being issued on the 26th of August. He did not, however, deliver any statement of claim until the 29th of November.

In the meantime (on the 29th of September) another quarter's rent had become due to the plaintiff, and by the determination of the tenancy on that day, in pursuance of a notice to quit, the defendant became entitled to an outgoing valuation, the amount of which he claimed in his statement of defence (delivered on the 22nd of December) by a "counter-claim" claiming 575*l.* 8*s.* 9*d.*, if the hay, straw, and fodder on the farm ought to be calculated at "sale" price, and 339*l.* 3*s.* 3*d.* if at a "feed" price.

In answer to this counter-claim the plaintiff "by way of set-off and counter-claim" claimed 175*l.* 5*s.* 9*d.* for the quarter's rent which had so become due on the 29th of September, and also 95*l.* 1*s.* 1*d.* for tithe rentcharge left unpaid by the defendant on his quitting and necessarily paid by the plaintiff, and these were the matters which it was sought to strike out.

(1) The statement of facts is taken from the judgment of the Court.

Feb. 13. *G. Denman*, for the defendant. Such a pleading as this is not a defence, but a new cause of action. *Beddall* v. *Maitland* (1) decides that a defendant may counter-claim matter arising since the commencement of the action, but this is no authority to shew that the plaintiff may do so in his reply. If such a right exists it must be by virtue of the Judicature Acts and Orders. Sect. 24, sub-s. 3 of the Judicature Act, 1873, does not assist the plaintiff, for the relief here sought cannot be "properly claimed by his pleading." Order XIX., rule 19: "No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim," is conclusive, unless some other order expressly permits this. Order XX., rule 1, only applies to a "defence" to a set-off or counter-claim of the defendant, and then only when it arises after statement of defence has been delivered. By Order XXIV., rule 2, if the defendant desires to plead anything more than a joinder of issue to this reply, he can only do so by leave of the Court or a judge, and upon terms. It cannot have been intended that a person defending himself against matter set up for the first time should be put on terms, and, under rule 3 of the same order, be limited to four days in which to deliver his pleading. In *Street* v. *Gover* (2) it was decided that a third party brought in by the defendant could not counter-claim against the defendant. This shews that it was not intended at this stage of the case to allow new matter to be introduced.

R. V. Williams, for the plaintiff. If this were an unreasonable claim it would be disallowed, but it arises at the same time and out of the same matter as the defendant's counter-claim. Both have arisen since the commencement of the action, and if the plaintiff cannot meet the counter-claim of the defendant in this way, the real question in dispute, namely, how the balance stood on Michaelmas Day, cannot be determined, and the plaintiff may lose this action although the defendant is indebted to him. Such a case must come within s. 24, sub-s. 7, of the Judicature Act, 1873. The reply may be supported either as a counter-claim or set-off, and set-off is a defence and within Order XX., rule 1. If a counter-claim is to be treated in all respects as a cross-action, *Winterfield* v. *Bradnum* (3), then this is a defence to a cross-

(1) 17 Ch. D. 174. (2) 2 Q. B. D. 498. (3) 3 Q. B. D. 324.

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action, and for the purpose of this reply the plaintiff is a defendant and entitled to all the rights of one. [He also cited *Ellis* v. *Munson*. (1)]

G. Denman, in reply.

Cur. adv. vult.

Feb. 23. The judgment of the Court (Field, J., and Huddleston, B.) was read by

FIELD, J., who after stating the facts as above set out, continued:—

It will be observed that as both the claims put forward in the reply arose before the statement of defence was delivered they could not be pleaded under Order XX., rule 1, although arising "pending the action," i.e., after writ issued, because the right thereby given so to plead is limited in express terms to grounds of defence arising after delivery of the statement of defence, so that unless the plaintiff is entitled in some other way to set up these matters in answer to the counter-claim he cannot get the benefit of them in this action, and the defendant will be entitled to recover under his counter-claim, by way of cross action, the balance of his outgoing valuation after deducting the Midsummer rent only, and without regard to these claims, so that the plaintiff, in order to recover the September quarter's rent and the tithes he has had to pay, must be driven to a separate action. It will be observed also that the plaintiff is placed in this position by the defendant having counter-claimed matter arising subsequently to the commencement of the action, which he claims the right to do according to the decision of Fry, J., in the case of *Beddall* v. *Maitland* (2), in which that learned judge declined to follow the previous decision to the contrary of the Master of the Rolls in *Original Hartlepool Collieries Co.* v. *Gibb*. (3)

It is not however necessary for us to express any opinion as to which of these two conflicting decisions we should be inclined to follow, as the plaintiff has not taken any objection to the defendant's pleadings, and the only question therefore for us to decide is whether the plaintiff is, by the exercise by the defendant of this alleged right, to be defeated in his action by matter of defence arising subsequently to the commencement of it, without the opportunity of setting up any defence he may have.

(1) 35 L. T. 585. (2) 17 Ch. D. 174. (3) 5 Ch. D. 713.

Now pleas of matters properly pleadable, although arising since the commencement of the suit, were, before the Judicature Acts, admissible if pleaded puis darrein continuance, and that right was intended to be preserved by Order XX., rule 1; but the right of a defendant to set up matter in answer, although not admissible under a plea of set off, was first given to a defendant by the Judicature Act of 1873, which by s. 24, sub-s. 3, gave power to the Court to grant to any defendant that relief, if he shall have properly claimed it by his pleading, and effect has been given to this section by Order XIX., rule 3, by which a defendant may set off, or set up by way of counter-claim, anything (i.e., whether liquidated or unliquidated), which would have furnished him with a cause of action or suit against the plaintiff. But, as was clearly pointed out by Mr. Denman in his argument for the defendant, a counter-claim by a plaintiff in answer to a defendant's counter-claim is not mentioned or referred to in terms either in the Judicature Acts or in Order XX., rule 1, or any other order framed under them.

If indeed any ground of defence to a set-off or counter-claim has arisen since the statement of defence, that is, as we have before observed, provided for by Order XX., rule 1; but the construction which is put by Fry, J., upon this rule, and in which construction we concur, is that the rule is limited to "defence" and does not extend to any relief which may be set up by way of counter-claim. It may be that any matter strictly pleadable as set-off might be considered to come within this rule, but, as we have already pointed out, the matter relied upon by the plaintiff in answer to the counter-claim having occurred since action brought and before statement of defence delivered, he can neither amend his statement of claim nor plead it puis darrein continuance, and must submit to a judgment in the action, even if upon the actual facts of the case the defendant may have no right to any sum of money from him, but may on the contrary, under the new state of things which came into existence on the 29th of September, be actually indebted to him. Mr. Denman however carried his contention a step further, for he urged that not only is there no express mention of a counter-claim by a plaintiff to a defendant's counter-claim in the Acts or order, but that a third party brought

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in by way of counter-claim by the defendant is in the same position as a plaintiff in being obliged to answer the counter-claim, and that in *Street* v. *Gover* (1) it was held that such a third party could not set up a counter-claim in answer.

Whether in that case a somewhat too narrow construction was not put upon the Judicature Act and its orders and rules may be open to question, and the late Lord Justice Lush appears to have entertained considerable doubt, but the decision proceeded upon the construction of the 8th rule of the same order, in which provision is actually made for the third party's conduct in such a case, but that provision is in language limited to "reply," that being the only word used in the rule. But in the present case no such fetter ties our hands, for if there be no rule or order either in terms or by necessary implication prohibiting the bringing forward of the matter alleged by way of counter-claim, and the right to raise it is given to the party pleading by the Judicature Act, it will be impossible for us to hold that the plaintiff is not entitled on setting up such matter to claim relief within s. 24, sub-s. 3; and if relief can be given upon it the pleading cannot be held to be embarrassing within the meaning of the 1st rule of the 27th Order. In order to see how this is we must look to the Judicature Acts.

Now the language of sub-s. 3, s. 24 of the Act of 1873, is as large as it possibly can be in giving to the defendant a right to counter-claim, and sub-s. 7 of the same section most explicitly compels the Court to grant all such remedies as "any" of the parties to a suit may appear to be entitled to in respect of any claim properly brought forward, "so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters may be avoided." Looking to this most beneficial provision, how is it possible to say that a matter upon which, if well founded, the plaintiff is clearly entitled to relief as against the defendant's counter-claim, is not within the very words and still more within the spirit of this large enactment, or to hold that such a matter is not properly brought forward at the only stage and in the only manner in which it can be raised. If it had arisen before action the plaintiff might have been properly told to amend his statement of claim—if it had arisen since the statement of

(1) 2 Q. B. D. 498.

defence and had been a ground of "defence" it might have been pleaded puis darrein continuance, but as the matter stands he must lose the whole benefit of it in this action if his pleading be struck out. And it is not owing to any fault of his own that he is placed in this position, but in consequence of the defendant having counter-claimed as he has done.

Further, it is not, perhaps, altogether clear that the right to plead as the plaintiff has done is not within a fair construction of Order XIX., rule 3, by which alone the defendant has acquired the right he has exercised, for by that rule the counter-claim is to have the same effect as a statement of claim in a cross-action (placing, as was held in *Stooke* v. *Taylor* (1) and *Winterfield* v. *Bradnum* (2), a defendant in the position of a plaintiff), and inasmuch as the rule proceeds to say that the Court is to be enabled to pronounce a final judgment in the same action upon the counter-claim as well as upon the original claim, it would seem somewhat strange justice to hold that the judgment so to be pronounced is to proceed solely upon the allegations in the counter-claim, without taking into account the cross rights of the plaintiff arising out of the very same contract and at the very same moment of time upon and at which the defendant's claims have their foundation.

There is another way of looking at it pointed out by Mr. Vaughan Williams. The defendant's counter-claim in the present case, overtopping as it does the amount of the plaintiff's claim, is in substance a cross-action in which the defendant is the plaintiff, and there is no great violence in construction in holding that the plaintiff for the purpose of litigating the counter-claim is in substance a defendant, and so well within rule 3 justifying a counter-claim. At all events we have come to the conclusion that the order of Mr. Justice Williams was well made and must be affirmed with the usual consequent costs.

Order affirmed.

Solicitors for plaintiff: *Duncan, Warren, & Gardenr, for Hallett Creery, & Furley, Ashford.*

Solicitor for defendant: *A. R. Steele, for John Minter, Folkestone.*

(1) 5 Q. B. D. 569. (2) 3 Q. B. D. 324.

A. M.

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Nov. 16.

In re HORTON.

Solicitor—Certificate—Stamp—Attendance of Country Solicitor at a Taxation in London—"Practising"—33 & 34 Vict. c. 97, s. 59—Schedule.

By 33 & 34 Vict. c. 97, s. 59, every person who "acts or practises" in any Court as a solicitor without having in force at the time a duly stamped certificate shall forfeit 50*l.*, and shall be incapable of maintaining any action or suit for the recovery of any fee on account of any act or proceeding done or taken by him in any such capacity. By the schedule the certificate if such person "practises or carries on his business" within ten miles from the General Post Office of the City of London is of a certain amount, and if he practises or carries on his business beyond the above-mentioned limits, is of a less amount. A solicitor, with a country certificate, and whose offices were at Birmingham, came up on a retainer and attended the taxation of a bill of costs within the ten mile radius:—

Held, that he did not, by this one transaction, act or practise in London within the meaning of the statute.

MOTION on appeal from an order of Pollock, B., at Chambers.

The plaintiffs having brought an action by Mr. Horton, their solicitor, recovered judgment and costs, and then wishing to tax his bill employed Messrs. Huggins & Mallard, solicitors of Birmingham, to tax it. Mr. Mallard attended the taxation at the Royal Courts in London, and the bill was on taxation reduced by the sum of 216*l.* Mr. Horton afterwards raised objections to the taxation and allowance of Messrs. Huggins & Mallard's bill for attending the taxation, on the ground that the country certificate held by Mr. Mallard did not justify him in practising within a radius of ten miles from the General Post Office. The taxing master set aside the objections, and his decision was affirmed by the order, against which Mr. Horton appealed.

Wood Hill, in support of the motion. By 33 & 34 Vict. c. 97, s. 59, every person who acts or practises in any Court as a solicitor without having in force at the time a duly stamped certificate, according to the provisions hereinafter contained and referred to, shall forfeit 50*l.*, and be incapable of maintaining any action or suit for the recovery of any fee on account of or in relation to any act or proceeding done or taken by him in any such capacity. By the schedule the certificate, if the solicitor practises or carries on business within ten miles of the General

Post Office is 9*l.* or 4*l.* 10*s.* according to his standing, if he practises beyond the limits the amounts are less.

Mr. Mallard, with only a certificate for the country, has "practised" in London, by attending the taxation, and cannot therefore recover his fees.

Every act in his capacity of solicitor within the limit is practising. He carries on business at Birmingham. But he acted or practised in London on the occasion in question. If there were not a distinction between carrying on business and practising the different terms would not have been used in the schedule. [He referred to 23 & 24 Vict. c. 127.]

Ringwood to shew cause, was not heard.

FIELD, J. It is said that, by 33 & 34 Vict. c. 97, s. 59, Mr. Mallard is incapable of recovering his fees for attending the taxation of the appellant's bill. I am not sure that obtaining payment of them by the proceedings in the present case is "recovery" within the terms of that section; but it is unnecessary to decide the point, and I will assume that it is so. The schedule of the Act prescribes the "certificate to be taken out yearly: 1, By every person admitted or enrolled in England. . . . as an attorney." "If such person practises or carries on his business"—the words "practises or carries on his business" seem like two equal alternatives—"within ten miles from the General Post Office in the City of London, 9*l.*" "In England, beyond the above-mentioned limits, 6*l.* if he has been admitted or enrolled, or has carried on business for three years or upwards," otherwise the sums are less. No suggestion of any impropriety or fraud by Mr. Mallard in taking out his certificate is made, or that it was not right at the time. He was retained by a client to act in the Court of the Master at the Central Office of the Royal Courts within the ten mile radius, and having attended a taxation there, is said to have come under s. 59, a penal enactment. By s. 59 every person who "directly or indirectly acts or practises in any Court as an attorney," without a duly stamped certificate, shall forfeit 50*l.*, and be incapable of maintaining any action for the recovery of any fee. "Acts or practices." There again, if the word "acts" stood alone it might receive a different construction,

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and so might the word "practises" if standing alone. But they must be read together, and I think that the phrase "acts or practises" relates to the schedule, because the acting or practising within the section must be "without having in force at the time a duly stamped certificate, according to the provisions hereinafter contained and referred to," viz., in the schedule. Taking the words "acts or practises" together, and turning to the schedule and finding "carries on his business," used apparently as an equivalent phrase, I think the intention of the legislature was not to strike at one particular transaction within the ten mile radius, but at the general carrying on of business and practising. Can it be said that a solicitor who comes up on one occasion and taxes a bill of costs at the Central Office, "carries on his business" within the ten mile radius, and shall be liable to a penalty of 50*l.*? I think the Act means carries on business with a quasi permanent habitat. The carrying on business is to regulate the stamp.

CAVE, J. I am of the same opinion. The question is, where does this gentleman practise or carry on business? In Birmingham, where he has an office or can be easily found and heard of, or in London where he has no office and where a client would never think of looking for him? Mr. Wood Hill says that if the solicitor does any business he "acts or practises." But I think the words "practises or carries on his business" point to a series of acts, and not to an isolated transaction.

Motion refused.

Solicitor for appellant: *Horton.*

Solicitors for respondent: *Indermaur & Co.*

J. R.

[IN THE COURT OF APPEAL.]

1881
June 21.

WILLIAMS AND OTHERS *v.* PHILLIPS AND OTHERS.

Inclosure—Extinguishment of Right of Common—Allotment—Lease of Land, to which Right of Common was formerly attached—8 & 9 *Vict. c.* 118.

When upon the inclosure of waste lands under 8 & 9 Vict. c. 118, rights of common over them have been extinguished, the allotments awarded in lieu of rights of common are not to be deemed parts of the lands to which the rights of common were annexed, but are to be deemed to have been granted to the owner of those lands; and a lease of land, to which rights of common were formerly attached, will not, after they have been extinguished by an inclosure of the waste lands, pass by general words the right to the possession of the allotment.

Rights of common over H. were attached to a farm. In 1857 a provisional order was made for inclosing H., and the rights of common over it were extinguished as from May, 1859. Allotments were made to the owner of the farm in lieu of the rights of common. In 1866 a lease for sixty years of the farm was granted at a fixed rent: the lease contained the usual general words:—

Held, that the right to the possession of the allotments did not pass with the lease.

ACTION for the recovery of land and for mesne profits.

Before the year 1857, William Thomas was the owner of certain lands situate in the parish of Aberdare, in the county of Glamorgan, and called Werfa Farm, to which commonable rights were attached over a common called Hirwain Common. In that year a provisional order was made for inclosing the same, and the inclosure was afterwards authorized by an Act of Parliament (20 & 21 Vict. c. 20). By virtue of the authority given by the Act of Parliament the commonable rights over Hirwain Common attached to Werfa Farm were extinguished from the 2nd of May, 1859. Certain pieces of land were afterwards allotted to William Thomas in lieu of the commonable rights. They did not form any part of Werfa Farm. The allotment was confirmed by the Inclosure Commissioners. William Thomas died. By an indenture dated the 1st of May, 1866, Richard Thomas, by virtue of certain powers vested in him, demised unto "William Williams, his executors, administrators, and assigns, all that farm and lands in the parish of Aberdare, in the county of Glamorgan, called Werfa Farm, with the farmhouse and other buildings thereon,

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together with all commons, ways, watercourses, rights, privileges, easements, commodities, and appurtenances whatsoever to the said hereditaments or any part thereof belonging, or usually held or enjoyed therewith," with certain exceptions not material to the present action, for the term of sixty years, at "the yearly rent of 60*l.* clear of all present and future rates, taxes, and deduction, except property tax, if any." The lease contained a covenant by William Williams to pay the yearly rent and all rates, taxes, and outgoings, except the property tax. William Williams died in the year 1878, and the plaintiffs were his executor and executrix and her husband. The land sought to be recovered consisted of the allotments made to William Thomas. The defendants named in the writ of summons did not appear, but C. J. James and T. J. Dyke, who were trustees of the will of William Thomas, obtained leave to appear and defend the action as landlords. The question between the parties was whether the plaintiffs, as executors and executrix, were entitled by virtue of the indenture of demise dated the 1st of May, 1866, to recover possession of the allotments, and to recover mesne profits in respect of them.

The action came on for trial before Joseph Brown, Esq., Q.C., Commissioner of Assize, without a jury, at the Winter Assizes, 1881, held for Glamorganshire, and was reserved for further consideration; and ultimately the learned Commissioner ordered that judgment should be entered for the plaintiffs to recover possession of the allotments, and for 130*l.* mesne profits.

The defendants appealed.

June 20, 21. *McIntyre, Q.C.*, and *Evans*, for the defendants. The right of common attached to Werfa Farm over Hirwain Common had been extinguished before the lease was granted to William Williams; as it was not in existence, it could not pass under the general words of the demise. Sect. 69 of the General Inclosure Act, 1845 (8 & 9 Vict. c. 118), allows rights of common to be extinguished before the award is made. (1) When the

(1) By the General Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 69: "It shall be lawful for the valuer acting in the matter of any inclosure, before the making of the award, when the Commissioners shall think necessary for the purpose of the inclosure, and by order under their seal authorize or direct, by

allotments were granted, they were not annexed to Werfa Farm, and would not pass by a lease of it: 1 Dart on Vendors and Purchasers, ch. iv. s. 2, p. 116 (5th ed.); *Fife* v. *Clayton*. (1) The general words of the lease were insufficient to regrant the right of common: *Hall* v. *Byron*. (2) The plaintiffs may rely upon *Doe* v. *Hellard* (3), and *Doe* v. *Willis* (4), but they are not in point. No doubt by s. 106 of the General Inclosure Act (5) the allotment

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notice on the church door, to order all or any parts of the rights of sheepwalk, common, or other rights in or over the land to be inclosed or any part thereof, to be extinguished from such time or the exercise thereof to be suspended during such time as shall be expressed in such notice, and from the time mentioned in such notice such rights shall be extinguished or suspended accordingly."

(1) 13 Ves. 546; 1 C. P. C. (temp. Lord Cottenham), 351.

(2) 4 Ch. D. 667.

(3) 9 B. & C. 789.

(4) 5 Bing. 441; 3 Moo. & P. 24.

(5) By the General Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 93, "nothing in this Act contained shall extend to revoke, make void, or alter any will, settlement, uses, or trusts, or to prejudice any person having any right or claim of dower, jointure, annuity, portion, debt, charge, rent, or incumbrance upon or affecting any of the land to be inclosed, or which shall be exchanged or given in partition, in pursuance of this Act, but the land allotted, and the land given in exchange or partition, shall immediately after such allotment, exchange, or partition be and enure, and the several persons to whom the same shall be allotted or given in exchange or partition as aforesaid shall thenceforth stand and be seised and possessed thereof respectively, to and for such and the same estates, uses, trusts, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the several lands, rights, or undivided shares thereof in respect whereof such allotments, exchanges, and partitions shall have been made, would have stood limited to and for or been subject to, in case the same had not been allotted, exchanged, or given in partition as aforesaid, and as if this Act had not been made, save and except such leases and tenancies at rack rents as shall become void by virtue of this Act, and any joint tenancy which may have been severed by partition as aforesaid, and such rights of common and other rights as are intended to be extinguished by the inclosure, and subject nevertheless to all such mortgages and sales as shall be made by authority of this Act.

94. "That all such land, as shall be taken in exchange or on partition or be allotted by virtue of this Act, shall be held by the person to whom it shall be given in exchange or on partition or allotted under the same tenures, rents, customs, and services as the land, in respect of which such land shall have been given in exchange or on partition or allotted, would have been held in case no such exchange, partition, or inclosure had been made; and the land taken in exchange or on partition or allotted in respect of freehold shall be deemed freehold; and the land

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is to be taken in satisfaction of the right of common; but it is not attached to the land in respect of which it is allotted: it becomes vested in the owner of the land, who may dispose of the allotment as he thinks fit.

B. T. Williams, Q.C., and *Brynmôr Jones*, for the plaintiffs. When the claim was sent in for an allotment in respect of Werfa Farm, the testator of the plaintiffs could not join in it, for the lease had not then been granted to him; nevertheless, it was intended to grant the farm to him with all the advantages belonging to it.

[BRETT, L.J. The General Inclosure Act (8 & 9 Vict. c. 118), s. 84, gives power to sell the right to an allotment; this shews that it is severed from the land to which the right of common

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taken in exchange or on partition or allotted in respect of copyhold or customary land shall be deemed copyhold or customary land, and shall be held of the lord of the same manor under the same rent and by the same customs and services, as the copyhold or customary land in respect of which it may have been taken in exchange or on partition or allotted was or ought to have been held, and shall pass in like manner as the copyhold or customary land in respect whereof such exchanges, partitions, or allotments shall be made, and as to copyhold and customary allotments without any new admittance in respect of the lands taken or allotted respectively; and the land given in exchange or on partition or allotted in respect of leasehold land shall in like manner be deemed leasehold, and shall be held under the same rents and covenants as the land in respect of which it may have been allotted was held, and the remainder or reversion thereof shall be vested in the same lessor respectively as the remainder or reversion of such other land was vested before the exchange, partition, or allotment, except where otherwise particularly directed by this Act.

106. "That the several allotments, which shall upon any inclosure under this Act be allotted to the several persons who shall be entitled to the same, shall when so allotted be and be taken to be in full bar of and satisfaction and compensation for their several and respective lands, rights of common, and all other rights and properties whatsoever, not excepted or reserved by this Act or by the award in the matter of such inclosure, which they respectively had or were entitled to in and over the said lands immediately before such inclosure; and that from and immediately after the confirmation of the award by the Commissioners, or at such earlier time as the valuer, with the approbation of the Commissioners, shall by notice on the church door direct, all rights of common, and all rights whatever by the inclosure intended to be extinguished, belonging to or claimed by any person whomsoever in or upon such lands, shall cease, determine, and be for ever extinguished."

was annexed, and is attached to the person of the owner. This is an argument which helps the case for the defendants; for the lease has no words granting the allotments.]

The Inclosure Acts were not intended to interfere with the estates and interests of owners and occupiers. Sects. 94, 95 of the General Inclosure Act are important; they shew that the allotment must be held by the same tenure and upon the same terms as the land in respect of which it is awarded; here the plaintiffs are possessed for a term of sixty years of Werfa Farm, and are entitled to the allotments made in respect of it.

[COTTON, L.J. What is the additional rent which the lessee would be bound to pay for the allotments? They are not mentioned in the lease.]

The testator of the plaintiffs took Werfa Farm with all the advantages attached to it: *Fife* v. *Clayton* (1) does not really bear a construction which will assist the argument for the defendants.

[BRETT, L.J. I do not think that case in point.]

Doe v. *Willis* (2) is a direct authority in favour of the plaintiffs; and it appears to be approved of in Sugden on Vendors and Purchasers, ch. x. s. 1, par. 34, p. 374 (14th ed.), where the author says, "Where the estate, in respect of which the allotment is made, is itself conveyed, of course it carries the right to the allotment with it, and it requires no special clause in the Act to give legal validity to such a conveyance."

[COTTON, L.J. The distinguishing feature of the present case is that before the grant of the lease the rights of common were extinguished.]

Some force ought, if possible, to be given to the general words of the lease. In 1 Dart on Vendors and Purchasers, ch. iv. s. 4, p. 164 (5th ed.), it is laid down as a general proposition that "where the estate, in respect of which the allotment is made, is conveyed to the purchaser prior to the actual award, the right to the allotment goes with it." The principle is laid down by the two authors just mentioned without any limitation. The

(1) 13 Ves. 546; 1 C. P. C. (temp. Lord Cottenham), 351.
(2) 5 Bing. 441; 3 Mco. & P. 24.

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extinction of the right of common cannot affect the construction of the lease.

Evans was not called upon to reply.

BRAMWELL, L.J. I think that the judgment should be reversed. I cannot think that any right to the allotments passed by the lease. It is improbable that the lease was intended to demise land which did not form a portion of the farm. It is difficult to understand how the rent could be calculated. The general words of the lease are to a certain extent unnecessary, but it is usual to insert them. I think it clear that they refer to rights usually enjoyed by an occupier, and are not apt words to include a right to an allotment. I cannot think that it was intended by the statute that a lessee of land should be entitled to an allotment made in respect of a right of common, which had been previously extinguished. I feel certain that the statute could have no such operation as that. I think that the judgment cannot be supported.

BRETT, L.J. Whether the Act of Parliament or the lease is first considered, the result will be the same. Werfa Farm had a right of common attached to it, so that any lease or conveyance of the farm would comprise the right of common. Under the Inclosure Act of 1845 the right of common was extinguished, and it was extinguished before the farm was demised to the plaintiffs' testator. The statute gave the owner a right to an allotment, but that right was not attached to the farm. Whilst it existed, the right of common must have been conveyed with the farm; but the statute gave a right of a different kind, which could be sold apart from the farm. After the right of common had been extinguished, the right to the allotment was something separated from the farm; it was given to the owner himself. If we turn to the words of the lease, we find that the land, of which the farm consisted, was thereby demised together with all existing rights of common thereunto belonging. At the time when the lease was granted, no rights of common existed over the common which was the subject of the proceedings for inclosure. The right to an allotment

existed, but that was vested in the owner himself, and was not something attached, belonging, or appertaining to the farm. It was annexed to the person, and not to the land. The same result is arrived at, if the lease is first looked at, and afterwards the statute.

I think that the judgment cannot be supported.

COTTON, L.J. The plaintiffs claim to be entitled to the allotments under the words of the statute and under the words of the lease. We must first ascertain what the facts are, and then see how the words of the lease are to be construed. Up to the year 1857 certain rights of common attached to Werfa Farm existed over a common called Hirwain Common. In 1859, by an order made under the Inclosure Act, the rights of common were extinguished, but the right to an allotment was created instead of it. I need not read the words of the lease. After the order had been made, no right of common attached to the farm existed over the land to be inclosed; but in substitution for the right of common a right to an allotment was created, which was given to the owner of the farm. I do not think that the words of the lease comprise the right to the allotments. It was not a right "belonging" to the farm; it was not "usually held or enjoyed" with the farm. Possibly by apt words the allotments might have been included in the demise; but they do not exist here, and it would be a little strange if a lease at a fixed rent were to include the right to allotments, which might not be finally set out for an indefinite number of years. In my opinion, therefore, the words of the lease do not pass the right to the allotments. The defendants have relied upon ss. 93, 94, of the Inclosure Act, but these enactments do not avail them; they do not apply to the present case. As to s. 93 I need only remark that in the present case the lessee never had any right of common. The effect of the enactment may be briefly said to be, that where lands to which a right of common is attached are in settlement, the land allotted in respect of the right of common shall be held upon the same limitations as the settled lands. Sect. 94 will not apply. It provides that where a claim has been made in respect of leasehold land, the allotment is held by

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the same title as the leasehold land itself: the lessee has the right to the enjoyment during the continuance of the lease; but when that is determined the allotment becomes vested in possession in the reversioner. These considerations will suffice to dispose of this case; but I wish to advert to the passage which has been cited from Sugden on Vendors and Purchasers, ch. x., s. 1, par. 34, p. 374 (14th ed.). The author was not dealing with a case like the present; he was treating of the purchase and conveyance of land. When land is sold to which a right of common is annexed, the purchaser is entitled to the right of common and to that which is given in substitution for it. The passage cited is not an authority for our guidance in the present case. The plaintiffs have also relied upon *Doe* v. *Willis*. (1) It is not very carefully reported, but it does not seem to have much weight in the present case. No doubt one question was whether the right to the allotment passed by the conveyance of the land. The Court of Common Pleas held that it did; but it does not appear that the right of common had been extinguished before the conveyance was executed. In the present case the right of common had been extinguished by an order long before the lease was granted.

Judgment reversed.

Solicitors for plaintiffs: *Bell, Brodrick, & Gray, for Linton & Kenshole, Aberdare.*

Solicitor for defendants: *I. H. Wrentmore, for James & Co., Merthyr Tydfil.*

(1) 5 Bing. 441; 3 Moo. & P. 24.

J. E. H.

THE METROPOLITAN BOARD OF WORKS, APPELLANTS; STEED BROTHERS, RESPONDENTS.

1881
Dec. 13.

Metropolis Local Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 98—*Formation and Width of Streets*—"*Open at both ends.*"

By the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), s. 98, no road being of less width than forty feet shall hereafter be formed or laid out for building as a street for the purposes of carriage traffic unless such road be widened to the full width of forty feet, or for the purposes of foot traffic only unless such road be widened to the full width of twenty feet, "or" unless such streets respectively shall be open at both ends:—

Held, that such street must be of the width prescribed and be also open at both ends.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The respondents, who were builders, appeared to a summons under s. 98 of 25 & 26 Vict. c. 102, charging that they, at Upper Holloway, St. Mary, Islington, did lay out a street for the purpose of carriage traffic with only one entrance, contrary to the by-law of the Metropolitan Board of Works and 25 & 26 Vict. c. 102, s. 98.

The by-law was made by the appellants in pursuance of the powers contained in s. 202 of 18 & 19 Vict. c. 120, and was as follows:—

"Every new street shall, unless the Metropolitan Board of Works otherwise consent in writing, have at least two entrances of the full width of such street, and shall be open from the ground upwards."

The proposed street or road extended from a point in the Holloway Road in a westerly direction to certain vacant ground belonging to the Tottenham and Hampstead Junction Railway, and did not communicate at the western end with any other road or approach, and there was a barrier or fence at the western end thereof.

The Board did not consent in writing or otherwise to the street or road being laid out in the manner mentioned in the preceding paragraph.

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On the part of the respondents it was contended (inter alia) that s. 98 had been complied with, and that the section did not require that there shall be two entrances to roads in the metropolis, and that the aforesaid by-law was repugnant to the laws of England.

The magistrate dismissed the summons subject to this case.

The question for the opinion of the Court was whether the above decision was correct?

Dec. 1. *Biron*, for the appellants. 25 & 26 Vict. c. 102, s. 98 (1), enacts that no existing road, passage, or way for the purposes of carriage traffic shall be formed unless it be widened to forty feet, or unless it shall be open at both ends. "Or" must be read "nor," and the road must be of the prescribed width, and also open at both ends. Otherwise the building owner might make a road as narrow as he chose, and so that vehicles could neither pass nor turn, if only he left it open at both ends. On the other hand, he might form a noisome cul de sac by merely making the roadway of the prescribed width. [He also relied on the by-law.]

Poland, for the respondents. The object of the Act was mainly to regulate the width of streets for sanitary purposes and not for traffic: see *Vestry of St. Mary's, Islington* v. *Barrett*. (2)

The true construction of s. 98 is, that if a new street is forty feet wide it need not be open at both ends, for the houses on either side will be sufficiently apart to leave space for ventilation between the opposite sides, but if the street is narrower, and the

(1) By 25 & 26 Vict. c. 102, s. 98, no existing road, passage, or way, being of less width than forty feet, shall be hereafter formed or laid out for building as a street for the purposes of carriage traffic, unless such road, passage, or way be widened to the full width of forty feet . . . . or for the purposes of foot traffic only, unless such road, passage, or way be widened to the full width of twenty feet . . . . or unless such streets respectively shall be open at both ends, from the ground upwards; and any road, passage, or way hereafter to be formed or laid out for either of the purposes aforesaid, shall be deemed to be a new street, or become subject to all the provisions of the recited Acts, and this Act, and to the provisions and penalties of, and under any by-laws made, or to be made, in pursuance thereof in relation to sewerage, drainage, or paving, and to width, construction, surface, inclination, and other requirements and particulars.

(2) Law Rep. 9 Q. B. 278.

sides more close together, the streets must be open at both ends that a current of air may pass through. The reading of the section which is suggested for the appellants involves a change of words.

[He disputed the validity of the by-law.]

Biron, in reply.

Cur. adv. vult.

Dec. 13. GROVE, J. The main question before us turns on the meaning of the word "or," used in 25 & 26 Vict. c. 102, s. 98. Read shortly, s. 98 enacts that no existing road, passage or way, shall be hereafter formed or laid out for carriage traffic, unless such road shall be forty feet wide, or for the purposes of foot traffic, unless such road be of the width of twenty feet, or unless such streets respectively shall be open at both ends. The question is whether that word "or" should be read in the disjunctive or conjunctive, or perhaps read as either "and" or "nor:" I think it means "nor;" that is to say, that the two things comprised in the prohibition are both prohibited, and not merely prohibited in the alternative. If the sense which I attribute to the word is right, it would have been more strictly grammatical to have written "nor" instead of "or." But I think that the meaning of the enactment is that the road must be of the width specified, and that no road shall be allowed unless it is of the width specified, nor unless it is open at both ends. That seems to me to be the object of the statute, which was passed for sanitary purposes, and also for the purpose of comfort and traffic.

It was contended that the object of the provision is sanitary only, and that if a street is forty feet wide, or if however narrow, it is open at both ends, good ventilation is secured. But a very long narrow street would hardly be more salubrious with both ends open than if one end were closed and the street were a cul de sac.

Our construction of the Act is according to the ordinary use of language, although it may not be strictly grammatical. We might have referred to authorities by good writers, shewing that where the word "or" is preceded by a negative or prohibitory provision, it frequently has a different sense from that which

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it has when it is preceded by an affirmative provision. For instance, suppose an order that "you must have your house either drained or ventilated." The word "or" would be clearly used in the alternative. Suppose again, the order was that "you must have your house drained *or* ventilated," that conveys the idea to my mind that you must have your house either drained or ventilated. But supposing the order were that "you must not have your house undrained or unventilated." The second negative words are coupled by the word "or," and the negative in the preceding sentence governs both. In s. 98 there is a negative preceding a sentence; "no existing road" shall be formed as a street for carriage traffic unless such road be widened to forty feet, or for the purposes of foot traffic only unless such road or way be widened to the width of twenty feet, "or" unless such streets shall be open at both ends. Probably, if the word "or" in the sentence, "or for purposes of foot traffic only," had been written "nor," the language there too would have been more clear and more decidedly prohibitory; but with regard to the sentence "or unless such streets shall be open at both ends" I think that by reading the word "or" as "nor" we carry out the intention of the Act, which was to have streets of a proper width and properly opened at both ends, and that there should not be incommodious and unhealthy cross streets which are culs de sac, shut up at one end.

There have been frequently cases on the construction of statutes where the Courts have held "or" to mean "and," taking the rest of the sentence in which the word "or" occurred, the object and intention being prohibition, and the two things prohibited being coupled by the word "or." I think the prohibition in s. 98 relates to both the width and open ending of streets. The street must be both of the width prescribed and also open at both ends.

That being my opinion upon the construction of 25 & 26 Vict. c. 102, s. 98, it becomes unnecessary to decide whether the by-law drawn under a previous statute was virtually repealed by this statute, which repealed that previous one.

I think, therefore, that our judgment should be for the appellants.

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LOPES, J. The question in this case is whether, according to the true construction of the 98th section, the legislature intended that the carriage roads and footpaths to be made under that section should be of a certain specified width and also open at both ends, or whether the legislature intended that it should be sufficient if they were either of the specified width or open at both ends. I do not hesitate to say that I entertained for a long time considerable doubt as to the meaning of the legislature. I was inclined to think that we ought to adopt the strict grammatical meaning of the words used, and ought to hold that if either the carriage road or the footway was of a specified width or open at both ends, that would satisfy the provisions of this section; and, no doubt, the legislature, assuming it to have meant to express that which we now think was intended, would have used much more apt and strictly grammatical terms if it had used the words either "nor," or "and." However, I have carefully looked through the different sections of the Act, and considered what I think would be the most reasonable interpretation of this section, and I agree with my Brother Grove, that the legislature did intend that there were to be two conditions attached to the laying out of a street under this section; namely, that the street must be of the width specified in the section, and it must also be open at both ends. I think, therefore, that the magistrate was wrong, and that this case should be remitted to him.

Decision reversed.

Solicitor for appellants: *R. Ward.*
Solicitor for respondents: *A. O. Underwood.*

J. R.

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March 28.

BURGOYNE AND OTHERS, PETITIONERS; COLLINS AND OTHERS, RESPONDENTS.

Municipal Election—Municipal Elections Act, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *sub-s.* 2—*Nomination — Subscription of Nomination Papers—Assenting Burgesses.*

Sect. 1, sub-s. 2, of the Municipal Elections Act, 1875, provides that every candidate at a municipal election shall be nominated in writing subscribed by two burgesses as proposer and seconder, and by eight others as assenting to the nomination, and that "each candidate shall be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more."

At a municipal election where there were four vacancies to be filled a burgess subscribed four nomination papers, which were delivered within due time, and subsequently he subscribed a fifth nomination paper, which was also delivered in due time. In each case he subscribed as one of the eight assenting burgesses required by the Act:—

Held, that the first four nomination papers were valid, and that the fifth was invalid.

SPECIAL CASE stated under the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), s. 15, sub-s. 6.

The material facts stated in the case were as follows:—

1. The borough of Clifton, Dartmouth, Hardness, is a borough not divided into wards.

2. The election of four town councillors for the borough was holden on the 1st of November, 1881, and the nomination for such election was duly fixed for the 22nd of October, 1881. The nomination papers to be delivered to the town clerk before five o'clock in the afternoon.

3. The four petitioners at the time of signing the nomination papers hereinafter mentioned, and at the time of the election, were persons duly qualified to be elected to the office of town councillor of the borough, and were respectively candidates at the election for that office.

4. The petitioners were duly nominated in writing as candidates at the election, and their respective nomination papers were duly signed by properly qualified enrolled burgesses, and were duly delivered to the town clerk by the respective proposers and

seconders in the afternoon of the 22nd of October, 1881. One Robert Peek, a duly qualified enrolled burgess, being one of the assenting burgesses in each case.

5. After the nomination papers of the petitioners had been delivered to the town clerk, Robert Peek, without the knowledge and assent of the petitioners, signed the nomination paper of one Frederick Hughes, as assenting burgess to Hughes's nomination, and the nomination paper was delivered to the town clerk before five o'clock of the afternoon of the same 22nd day of October.

6. Five other candidates were also nominated on the said 22nd day of October, namely, the four respondents and one H. C. Collier.

7. On the 24th of October, 1881, one of the respondents objected in writing, before the deputy mayor of the borough, to the respective nomination papers of the petitioners and of Hughes, on the ground that the respective nominations were void, one of the burgesses (the said R. Peek) subscribing the same, having subscribed the nomination papers of five candidates, there being only four vacancies.

8. The deputy mayor gave his decision in writing in each case allowing the objection. The petitioners were thereby prevented from being candidates at the election.

H. C. Collier withdrew from his candidature on the 24th of October, and on the 26th of October the town clerk published the names of the respondents, and H. C. Collier as the only persons duly nominated, and announced that H. C. Collier had duly withdrawn from his candidature.

On the 1st of November the mayor announced that the number of candidates was reduced to the number of persons to be elected, and declared that the respondents had been duly elected.

14. If the nomination papers of the petitioners, or any of them, were valid, then the election of the respondents was not a valid and legal election.

The question for the opinion of the Court was whether or not the respondents were duly elected.

J. D. Fitzgerald, for the petitioners. The mayor's decision was

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wrong. The provisions of the Municipal Elections Act, 1875 (1), were duly complied with in respect to the nomination papers of the four petitioners. The nomination paper of Hughes was the only one rendered invalid by what Peek did: *Reg.* v. *Harrald.* (2) The mayor had no power to decide the objection. He can only decide as to the form of the nomination papers: *Howes* v. *Turner.* (3)

No counsel appeared for the respondents.

MATHEW, J. The only question for the opinion of the Court being whether or not the respondents were duly elected, I am of opinion that they were not. If the mayor could entertain the objection to the nomination papers at all he ought to have decided that the nomination papers of the four petitioners were valid, and that of Hughes was invalid.

CAVE, J. I am of the same opinion.

Judgment for the petitioners.

Solicitors for petitioners: *J. E. Fox & Co., for R. W. Prideaux, Dartmouth.*

(1) The Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), enacts provisions with respect to the nomination of candidates at municipal elections.

By s. 1, sub-s. 2: At any such election every candidate shall be nominated in writing; the writing shall be subscribed by two enrolled burgesses of the borough or ward as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination. "Each candidate shall be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more."

By sub-s. 3: The mayor shall attend at the town hall on the day next after the last day for the delivery of nominations to the town clerk, "and shall decide on the validity of every objection made to a nomination paper. . . . The decision of the mayor, which shall be given in writing, shall, if disallowing any objection to a nomination paper, be final, but if allowing the same shall be subject to reversal on petition questioning the election or return."

(2) Law Rep. 8 Q. B. 418.

(3) 1 C. P. D. 670.

W. A.

HALE AND ANOTHER *v.* BOUSTEAD AND OTHERS. 1881 Dec. 20.

Bankruptcy—Debt incurred by Fraud—Action against Debtor and Trustee in Liquidation—Separate Estate of Debtor—Right of Action against Trustee.

In an action against liquidating debtors and their trustee, to recover advances of money obtained from the plaintiffs by the debtors through false and fraudulent representations before the liquidation, the plaintiffs claimed, inter alia, a declaration that they were entitled to prove for the amount of the advances, and interest at 5 per cent. to the date of the liquidation, either against the joint estate of the liquidating debtors or against the separate estate as the plaintiffs might elect:—

Held, on demurrer by the trustee, that, as the plaintiffs might in this action obtain some relief against him, the claim was good.

STATEMENT OF CLAIM alleged that prior to July, 1879, the defendants, J. Boustead and A. W. Ridley, carried on business as agents; that the firm instituted proceedings for liquidation by arrangement in July, 1879, and the defendant Cooper was appointed trustee of the joint and separate estates of the liquidating debtors, and still continued to be such trustee; that the defendants Boustead and Ridley in 1878, by false and fraudulent representations, induced the plaintiffs to make large advances and to forbear their debt; and the plaintiffs claimed, inter alia,—

(3.) A declaration that the plaintiffs were entitled to prove for the amount of the said advances, and interest at the rate of 5 per cent. to the date of the liquidation, either against the joint estate of the liquidating debtors or against the separate estate as they might elect.

Demurrer by the defendant Cooper, on the ground that the claim disclosed no ground of action as against him.

J. Thompson, for the defendant Cooper. Paragraph 3 affects the trustee. No action can be maintained for a proveable debt. The plaintiffs should proceed in the Bankruptcy Court, and the trustee ought not to be made party to the action: *Barter* v. *Dubeux*. (1) [He was stopped.]

Sir F. Herschell, S.G. (*Moulton*, with him), for the plaintiffs. Under the new procedure the Court can have all parties before it. The claim alleges fraud, and if the action is well founded, then,

(1) 7 Q. B. D. 413.

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first, the debtors are personally liable, and secondly, there is a right of proof against the separate estate of the defendants Boustead and Ridley: *Ex parte Adamson, In re Collie* (1), and it is right to join the trustee: *Emma Silver Mining Co.* v. *Grant.* (2) "He is a necessary party," said Mellish, L.J., in *Ex parte Coker, Re Blake* (3), and is chiefly interested.

[*J. Thompson.* The action in both those cases was brought before liquidation.]

That does not affect the question of suing the trustee. He desires an opportunity of contesting the right of proof in the Court of Bankruptcy. But the plaintiffs should not be forced to try the same question twice: *Ex parte Smith, In re Collie.* (4)

In *Barter* v. *Dubeux* (5) the defendant, in answer to an action on a bill, set up fraud against the plaintiffs. But here the plaintiffs set it up, and seek to prove against the separate estate because of fraud.

J. Thompson, in reply. Suppose the action were brought against the trustee alone, it could not be maintained in this Court. Then, unless the plaintiffs can shew that it is necessary to join him in order to obtain relief against the other defendants, he is improperly joined. Before the Judicature Act, an action could not be maintained at common law against the trustee in bankruptcy for a proveable debt, nor could a bill be filed against him in Chancery unless he was interested in the matter, as no doubt he often was. In *Emma Silver Mining Co.* v. *Grant* (2), Jessel, M.R., said that the plaintiff company was "to be at liberty to go in and prove" under the liquidation. The Court evidently thought the question whether the debt was proveable was not a question for them. The point never arose in that case, but did arise and was decided in *Barter* v. *Dubeux* (5), which has not been distinguished by the Solicitor-General saying that because there is fraud in this case the plaintiffs are entitled to prove against the separate estate. It is not the less a proveable debt because there was fraud, but rather the more so. If, according to *Barter* v. *Dubeux* (5), the trustee cannot be sued for an ordi-

(1) 8 Ch. D. 807.
(2) 17 Ch. D. 122.
(3) Law Rep. 10 Ch. 652.
(4) 2 Ch. D. 51.
(5) 7 Q. B. D. 413.

nary proveable debt, there is surely no right of action against him when the claim is for a declaration of right to prove, "That is a declaration which ought to be made, not by the High Court, but by the Court of Bankruptcy, or by the county court judge," per Bramwell, L.J. (1)

Cur. adv. vult.

CAVE, J. In this case the plaintiffs bring an action against Boustead and Ridley and their trustee, claiming, as against the two former defendants, judgment for the amount of certain advances made by the plaintiffs to those defendants, and a declaration that those advances were obtained by fraud, and, as against the trustee, a declaration that they are entitled to prove for the amount of their advances either against the joint estate of the liquidating debtors or their separate estate as they may elect. The trustee has demurred, on the ground that the claim discloses no ground of action as against him.

In *Emma Silver Mining Co.* v. *Grant* (2), a case which in its facts was not very dissimilar to this, the plaintiffs brought an action against Grant to make him liable for a secret profit he had made on the sale of a mine to the company which he had formed for its purchase. After a specific sum had been found due from him to the plaintiffs on that footing, Grant presented a petition for liquidation, and, the trustee having been joined as a defendant by order of revivor, the plaintiffs moved for and obtained judgment against the trustee that they should be at liberty to go in and prove under the liquidation for the specific sum found due, and also against Grant for payment of the debt or so much thereof as should not be received by the company under the liquidation. This appears to me to involve the proposition that, upon the facts alleged, the plaintiffs in this action may obtain some relief against the trustee. It is said that the right of the plaintiffs to relief against the trustee was not questioned in the Emma Mining Company's case, but I find that Mr. Whitehorne, on behalf of the trustees, did submit that the Court had no jurisdiction to give leave to prove, and the notice of motion was

(1) 7 Q. B. D. at p. 416. (2) 17 Ch. D. 122.

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altered so as to ask that plaintiffs should be "at liberty to go in and prove" instead of "admitted to prove."

Then is there any authority the other way? Mr. Thompson, who argued the case very ably for the trustee, says that there is, and refers me to *Barter* v. *Dubeux* (1), but that case does not decide that no relief can be given in this Division in such an action as the present, but only that the trustee under the circumstances of that case ought not to have been joined as a defendant under Order L., rule 2, because the only relief which could be given against him could be more properly given in the Court of Bankruptcy. It is obvious that it is quite one thing to say that a discretion to join the trustee, which is only to be exercised if it is deemed necessary for the complete settlement of all the questions involved in the action, was wrongly exercised in a particular case, and quite another thing to say that, when an action for advances obtained by fraud is brought against a liquidating debtor in the High Court, no relief can be obtained against the trustee who is a party to the action.

If it is objected that this decision will enable litigants to prove their debt in the High Court instead of the Bankruptcy or County Court, the answer is that the trustee may move the Bankruptcy Court to restrain the action, so far as he is concerned. It may be, looking at the cases of *Ex parte Smith, In re Collie* (2), and *Ex parte Coker, In re Blake* (3), that such an application would not meet with success in all cases, but that is an argument rather against than in favour of this demurrer. There must be judgment for the plaintiffs, with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Linklater & Co.*
Solicitors for defendant Cooper: *Hollams, Son, & Coward.*

(1) 7 Q. B. D. 413. (2) 2 Ch. D. 51.
(3) Law Rep. 10 Ch. 652.

J. R.

THOL *v.* HENDERSON AND ANOTHER. 1881 Dec. 3.

Damages—Contract—Remoteness—Loss of Profit on Contract to resell.

In an action for breach of contract to deliver goods it was shewn that the goods were not procurable in the market, that the plaintiff had entered into a contract of subsale, which in consequence of the non-delivery he could not perform, that such contract was not known to the defendant at the time of sale, but that he knew that the goods had been purchased by the plaintiff for resale:—

Held, by Grove, J., that the plaintiff was not entitled to recover damages for loss of profit on the resale.

Borries v. *Hutchinson* (8 C. B. (N.S.) 445) distinguished.

FURTHER CONSIDERATION.

This was an action tried before Grove, J., at the London Sittings, on the 2nd of August, 1881. The plaintiff claimed damages for breach of a contract of the 6th of March, 1880, to deliver 200 chests B R second orange shellac, to be shipped from Calcutta during the months of April $\frac{\text{and}}{\text{or}}$ May, 1880, at a given price, quality guaranteed to be about equal to sealed sample. On the 15th of June, 1880, the defendants declared their inability to carry out the contract. The statement of claim averred that at the time of making the contract the defendants knew that the plaintiff had purchased for the purpose of re-selling the goods upon the same terms and conditions on which he had purchased, and that before the 15th of June, 1880, the plaintiff did resell the whole of the shellac, and by the failure of the defendants to deliver had lost the profits which he would have made on such subsale, and had become liable in damages to his purchasers. It further averred that there was no market in which the plaintiff could procure for delivery to his sub-purchasers shellac which could be tendered to them under the conditions contained in the contract of subsale and also in the contracts of the 6th of March, 1880.

The defendants paid into court the difference between the contract price and the sum which they estimated to be the market value of shellac of similar quality on the 4th of June, 1880.

The jury found that it was known by the defendants at the

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time of the contract that the plaintiff purchased for resale, and that the brand B R was a known brand in the market. It was admitted that unless the plaintiff could recover in respect of the subsale the amount paid into court was sufficient.

R. T. Reid (*Murphy, Q.C.*, with him), for the plaintiff.
Cohen, Q.C., and *Hollams*, for the defendants.

GROVE, J. The question is, on what principle damages are to be assessed in this case, and whether the plaintiff is entitled to damages for loss of profit on a sub-contract which he had made for the sale of the goods. This sub-contract was not known to the seller at the time of the sale, but it was known that the plaintiff had purchased the goods for the purpose of resale. On these facts I think the damages ought not to be assessed so as to include loss of profit on the subsale. The case that struck me most during the argument was *Borries* v. *Hutchinson* (1), and at first sight it would appear that the language there used would bear the interpretation put upon it by Mr. Reid, but further consideration will, I think, shew that there is a difference between the cases.

In that case the existence of the sub-contract was known to the seller at the time of the sale, or at all events the fact was known to the seller that the goods were purchased for a specific purpose, and that, delivery being required for that specific purpose, the buyer would incur loss by such non-delivery as would prevent his effecting that specific purpose. So that the seller must be taken to have had notice either of the subsale or that the goods were bought for some specific purpose, that is, in general terms, that he had knowledge of the purpose for which the goods were bought. The loss arising when that purpose could not be carried out was something which the parties to the contract may be taken to have contemplated as a result of breach of contract, and the case is really a modification of *Hadley* v. *Baxendale*. (2) The same reasoning applies to beasts bought for a particular market, or an engine to be supplied for a particular purpose. In the

(1) 18 C. B. (N.S.) 445; 34 L. J. (C.P.) 169.
(2) 9 Ex. 341; 23 L. J. (Ex.) 179.

present case all that was known by the defendants was that the goods were purchased with a general intention to resell them. If that knowledge is to be taken as the test of the seller's liability I do not see why in any case he should not be liable, however speculative the resale may be. I do not think such knowledge brings the case within the rule of *Hadley* v. *Baxendale* (1), and as it was admitted that unless the plaintiff is entitled to damages for the loss of profit on the resale he is not entitled to more than the money paid into court, there must be judgment for the defendants.

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THOL v. HENDERSON.

Judgment for the defendants.

Solicitors for plaintiff: *Plews, Irvine, & Hodges.*
Solicitors for defendants: *Hollams, Son, & Coward.*

A. M.

[IN THE COURT OF APPEAL.]

1882
Feb. 21.

THE QUEEN *v.* THE WIMBLEDON LOCAL BOARD.

Meeting of Ratepayers—Poll—Public Libraries Act, 1855 (18 & 19 *Vict. c.* 70), *s.* 6—*Public Libraries Amendment Act* (*England and Scotland*), 1866 (29 & 30 *Vict. c.* 114), *ss.* 5, 7—*Public Libraries Amendment Act,* 1877 (40 & 41 *Vict.*), *c.* 54, *s.* 1.

A meeting of ratepayers was summoned for the purpose of determining whether the provisions of the Public Libraries Acts should be adopted in the defendants' district. A chairman having been chosen, the resolution to adopt the Acts was carried upon a show of hands; a poll was demanded, but the chairman refused to grant it. The defendants declined to put in force the Acts:—

Held, that the right to demand a poll existed by the Common Law, and had not been taken away by any of the provisions contained in the Public Libraries Acts, and that the defendants could not be compelled by mandamus to carry out the Acts.

THE following facts were stated in the affidavits used, or were admitted at the hearing of this case.

The defendants were constituted under the Local Government Act, 1858, in or about the year 1866.

About the month of February, 1881, a requisition signed by

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

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more than ten ratepayers in the district of Wimbledon was presented to the defendants, desiring them to summon a meeting of ratepayers to decide as to the adoption of the Public Libraries Acts. The defendants accordingly summoned a meeting of ratepayers by public notice. The meeting was held on the 4th of March, and the vicar of Wimbledon was chosen chairman. A resolution to adopt the Public Libraries Acts was proposed, and upon a show of hands it appeared that a majority of the ratepayers were in favour of it, and the chairman declared the resolution to be carried, whereupon two ratepayers demanded a poll. The chairman refused to grant it, as he doubted whether he had power so to do. He soon after quitted the chair, and the meeting was dissolved without adjournment. The defendants refused to carry the Public Libraries Acts into effect on the ground that they had not been duly adopted owing to the refusal to grant a poll.

The Queen's Bench Division discharged a rule for a mandamus commanding the defendants to adopt and carry out the Public Libraries Acts.

The prosecutor appealed.

Feb. 20, 21. *Norman Bazalgette*, for the prosecutor. First, the enactments as to establishing public libraries are inconsistent with the right of the ratepayers to demand a poll. By 18 & 19 Vict. c. 70, s. 6, as varied by 29 & 30 Vict. c. 114, s. 5 (1), if more than one half of the ratepayers present at the meeting determine that the Act shall be adopted, "the same shall thenceforth take effect:"

(1) By the Public Libraries Act, 1855 (18 & 19 Vict. c. 70), s. 6, "The board of any district, being a place within the limits of any improvement Act . . . . shall, upon the requisition in writing of at least ten persons assessed to and paying the improvement rate, appoint a time not less than ten days nor more than twenty days from the time of receiving such requisition, for a public meeting of the persons assessed to and paying such rate in order to determine whether this Act shall be adopted for such district . . . . and if at such meeting two-thirds of such persons as aforesaid then present shall determine that this Act ought to be adopted for the district, the same shall thenceforth take effect and come into operation in such district, and shall be carried into effect according to the laws for the time being in force relating to such board."

By the Public Libraries Amendment Act (England and Scotland), 1866 (29 & 30 Vict. c. 114), s. 5, "The majority necessary to be obtained for the adoption of the said Act, or the Public Libraries Act (Scotland), 1854, shall be more than one half of the persons pre-

the use of the word "thenceforth" shews that the decision of the meeting is to be regarded as final, and that the opinion of no other persons is to be taken. By 29 & 30 Vict. c. 114, s. 7, the right to demand a poll in Scotland is abolished; and as the statute was passed for the purpose of assimilating the law of England and Scotland, s. 7 is tantamount to a legislative declaration that the right to demand a poll does not exist in England. But 40 & 41 Vict. c. 54, puts the matter beyond all doubt, for the preamble declares that a public meeting is a most incorrect and unsatisfactory mode and "fails to indicate the general opinion of the ratepayers," and s. 1 confers a power to ascertain the opinions of the ratepayers by the issue of voting papers, and this power is a substitution for the right to demand a poll. The two modes of proceeding are inconsistent.

Secondly, no right to demand a poll in the present case exists at common law. It only exists in the case of vestries or meetings summoned by vestries. The right to a poll attaches by custom to

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sent at the meeting, instead of two-thirds of such persons, as now required."

Sect. 6, "The Public Libraries Act, 1855, and the Public Libraries Act (Scotland), 1854, shall be applicable to any borough, district, or parish or burgh, of whatever population."

Sect. 7, "So much of s. 6 of the Public Libraries Act (Scotland), 1854, as authorizes the demanding of a poll, and ss. 7 and 8 of the said Act, are hereby repealed."

By the Public Libraries Act, 1855, Amendment Act, 1871 (34 & 35 Vict. c. 71), s. 1, "Every local board, under the Public Health Act, 1848, and the Local Government Act, 1858, or either of them, is empowered, in like manner as a board under any Improvement Act, to adopt and carry into execution the principal Act."

By the Public Libraries Amendment Act, 1877 (40 & 41 Vict. c. 54), "Whereas by the Public Libraries Acts . . . . 29 & 30 Vict. c. 114, for England . . . . the mode by which the Act is to be adopted is prescribed to be by public meeting, and it has been found that in many cases a public meeting is a most incorrect and unsatisfactory mode, and fails to indicate the general opinion of the ratepayers, and it is desirable to ascertain these opinions more correctly:"

Sect. 1, "It shall be competent for the prescribed local authority in any place or community which has the power to adopt" the above recited Acts, "to ascertain the opinions of the majority of ratepayers either by the prescribed public meeting, or by the issue of a voting paper to each ratepayer, and the subsequent collection and scrutiny thereof, and any expense in connection with such voting papers shall be borne in the same way as the expense of a public meeting would be borne, and the decision of the majority so ascertained shall be equally binding."

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vestries which have been held for hundreds of years. The defendants' counsel may rely upon *Reg.* v. *Vestry of St. Mathew, Bethnal Green* (1); but it is distinguishable upon several grounds; there the meeting was summoned by overseers, and was in effect a meeting summoned by the vestry; the decision proceeded upon s. 8 of 18 & 19 Vict. c. 70 and not upon s. 6, which is in point for the present case; and the case was decided before the passing of 40 & 41 Vict. c. 54.

[COTTON, L.J. How can a meeting summoned by a vestry stand upon the same footing as a vestry?]

The reasoning of the judgment in *Reg.* v. *D'Oyley* (2) shews that the right to demand a poll is confined to vestries.

[BRETT, L.J. That case really turned upon the authority of the rector of a parish. Under the old system of parliamentary election candidates were chosen upon a show of hands, and a poll was demanded on behalf of him who had the smaller number. A poll is a mere enlargement of the meeting.]

Parliamentary elections depend upon the law of parliament; no principle drawn from them can apply to other proceedings.

Alexander Glen, for the defendants, was not heard.

BRETT, L.J. The argument of this case for the prosecutor has been clear, and has not been unduly prolonged; but it has not convinced me that the rule for a mandamus ought to be made absolute. I agree with the judgment of the Queen's Bench Division. The facts may be briefly stated in the following terms:—A meeting was called for the purpose of considering whether the Public Libraries Acts should be adopted; the votes of those present were counted, and upon a show of hands a resolution to adopt the Acts was carried; a poll of the ratepayers qualified to vote was demanded; but the clergyman of the parish, who was in the chair, refused to grant it; the Local Board declined to put the Acts in force, a poll having been demanded and refused. Application was made to the Queen's Bench Division for a mandamus, but that Court was of opinion that the application ought not to be granted because no final resolution had been arrived at. The ground of the decision

(1) 32 L. T. (N.S.) 558. (2) 12 A. & E. 139.

may be assumed to be that no final vote had been taken, for any qualified person is entitled to claim a poll of ratepayers, that is, a poll of all persons capable of being legally present; a large number of persons were present, but it was a meeting which was never formally concluded, a poll having been demanded and not having been taken. It has been argued for the prosecutor that no right to a poll exists at common law, and that if it does it has been taken away by Act of Parliament. It has been contended that the right to a poll exists at common law only in the case of meetings of vestries or of meetings called by vestries; if it exists in the case of meetings called by vestries it is difficult to say where the right can stop; but the proposition is really larger, and the question is whether it is not an attribute at common law of all public meetings, that any qualified person may demand a poll, and the meeting may be enlarged so that all persons duly qualified may come in and take part in the decision. Cannot a meeting be adjourned at common law? Lord Stowell has laid it down as a rule of law that a poll can be demanded, and that when it is taken it is an abandonment of what has been done before: *Anthony* v. *Seger* (1); and the terms of his opinion are not confined to meetings of vestries; he seems to have thought it the regular mode of taking popular elections. In *Campbell* v. *Maund* (2) the judgment of the Court of Exchequer Chamber (which was the Court of Error) was delivered by Tindal, C.J. The language of that judgment extends to all kinds of popular elections; for it is there said that "the right to demand a poll being, as it appears to us, by the common law an incident to the popular election of a person to an office, we think the electors cannot be deprived of it without a special custom of election inconsistent with such right, or expressly excluding it by negative terms." And reliance is placed upon the judgment of Lord Stowell above-mentioned. In fact, the general line of reasoning in *Campbell* v. *Maund* (2) is taken from the views of that learned judge. In *Reg.* v. *How* (3) when the poll was demanded, the vestrymen were not acting under a jurisdiction conferred upon them by the common law, but were discharging a statutory duty; and it was held that to a

(1) 1 Hagg. C. C. C. 13. (2) 5 A. & E. 865, at p. 880.
(3) 33 L. J. (M.C.) 53.

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meeting of that kind the rule of the common law did apply, and that a poll was demandable as of common right; the power of asking for a poll can only be taken away by the clear words of a statute. Both reason and authority shew that where a large class of persons exists who are qualified to take part in a meeting, an opportunity ought to be given of summoning them and of allowing them to record their votes.

The further question arises whether the right has been affected by the statutory provisions which have been cited. I think not. The clause at the end of s. 6 of the Public Libraries Act, 1855, which provides that if at the meeting of the ratepayers two-thirds of those present shall determine that the Act ought to be adopted, "the same shall thenceforth take effect," does not destroy the right which exists at common law. It follows from *Reg.* v. *How* (1), that the right to demand a poll cannot be taken away by a mere implication, which is not necessary for the reasonable construction of the statute. It may have become under 40 & 41 Vict. c. 54, s. 1, unnecessary to summon a public meeting, and the opinions of the ratepayers might have been ascertained by voting papers; but a public meeting was in point of fact held, and all the incidents of the common law applied to it. The taking of a poll is a mere enlargement of the meeting at which it was demanded.

COTTON, L.J. I think that the mandamus was rightly refused. The view of the Queen's Bench Division was correct. The meeting was composed of persons whose right to be present depended upon rating: in the eye of the law all ratepayers were entitled to be present and to record their votes. They were in the same position as parishioners assembled in vestry, and to a meeting of this kind the right at common law does apply: the case of *Reg.* v. *Vestry of St. Mathew, Bethnal Green* (2), and the judgment of Cockburn, C.J., are directly in point. It has been argued that in that case the meeting had not been called by a public body such as a local board, but that it was the meeting of a vestry, or a meeting called by a vestry. It is impossible to maintain this distinction. The right to the poll

(1) 33 L. J. (M.C.) 53. (2) 32 L. T. 558.

does not depend upon the question by whom the meeting is called. A poll is not a new meeting, but it is a mode of ascertaining the sense of the meeting which is continued for that purpose, and, further, where a qualification exists, it is a mode of ascertaining whether the persons tendering their votes do in fact possess that qualification. If the right to demand a poll extends to a meeting called by a vestry, or by overseers, it must be extended to meetings called by any other local authority. The meeting of ratepayers did not come to an end, for the poll which was demanded has never been held. I do not think that the provisions of the Public Libraries Acts, which have been relied upon, make any difference. It is provided by the Public Libraries Amendment Act, 1877 (40 & 41 Vict. c. 54), that the local authority may ascertain the opinions of the majority of the ratepayers by voting papers, without preliminary discussion; but the power to summon a public meeting is preserved, and the right at common law to demand a poll is not taken away. It is true, that the right to demand a poll in Scotland was taken away by 29 & 30 Vict. c. 114, s. 7: why that enactment was passed, it is a little difficult to say; but it is not sufficient to abolish the right in England if it is shewn that it existed by the common law. On both points which have been urged before us, the appeal against the decision of the Queen's Bench Division fails.

Appeal dismissed.

Solicitor for prosecutor: *W. F. Summerhays.*
Solicitor for defendants: *W. H. Whitfield.*

J. E. H.

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Feb. 24.

THE QUEEN ON THE PROSECUTION OF THE MAIDSTONE RURAL SANITARY AUTHORITY, RESPONDENTS; JESSE ELLIS, & CO., APPELLANTS.

Highway—Highways and Locomotive Amendment Act, 1878 (41 & 42 *Vict.* c. 77), *s.* 23—*Extraordinary Traffic—Excessive Weight—Branch Road—Conveyance of Manure to Farm—Traction Engines.*

Justices having made an order charging the expenses of repairing a highway upon the appellants as being extraordinary expenses within 41 & 42 Vict. c. 77, s. 23, it appeared that the highway communicated at either end with main roads, and was principally used by farmers and occupiers of land adjoining it for ordinary farm traffic. The appellants having been employed to convey a quantity of manure to a farm adjoining the road, carried it there by means of a traction engine and trucks, the engine weighing eight and the truck five tons. The road, which had not been prepared for, and was not adapted to, the weight of traction engines, was, in consequence of such traffic, rendered unfit for use. The carriage of farm materials and produce by traction engines was usual in the neighbourhood, though not upon this particular road:—

Held, that the order was right, the passage of traction engines and trucks being "extraordinary traffic" upon the particular road.

UPON appeal to the quarter sessions for the western division of Kent against an order of justices, adjudging that the appellants should pay 28*l.* 9*s.* and costs as and for extraordinary expenses incurred by the respondents in repairing damage done to a highway by excessive weight and extraordinary traffic conducted thereon by order of the appellants, the sessions confirmed the order, subject to the following case:—

1. The road in question is called the Broad Torstal and Mackender Road, in the parish of Marden. It is about two miles in length, and twenty-one feet wide from hedge to hedge, the metalled part being eight feet wide, and it communicates at either end with a main road, and is principally used by farmers and occupiers of land adjoining it (for ordinary farm traffic).

2. The appellants are a firm of proprietors of traction engines and waggons, carrying on business at Maidstone and elsewhere in Kent, and the respondents are the authority which is liable, or has undertaken, to repair the highway in question.

4. In February, 1881, a Mr. Wigan, a farmer living at Mackender Farm, adjoining the road, purchased about sixty tons of

manure at Brenchley, a place about four miles distant from his farm, and his foreman employed the appellants to cart the manure to Mackender Farm at the rate of ninepence per ton. The foreman pointed out to the appellants the place where the manure was to be deposited, but no further directions were given as to the mode in which the same was to be conveyed. The foreman, however, stated that he employed the appellants knowing that they owned traction engines and would be likely to use them in carting the manure, and because there was no other way of getting it carried within the necessary time.

5. The manure was accordingly conveyed in February and March to Mr. Wigan's farm by means of the appellants' engine and trucks. The engine made two journeys each day with two trucks. Each truck when loaded weighed about five tons, the weight of the engine being eight tons or thereabouts. The road was, in consequence of such traffic, worn into deep ruts, and the metalled part was bulged into the ditches on each side, and the road was rendered unfit for use.

6. The road was the only route by which the spot indicated by Mr. Wigan's foreman for the deposit of the manure could be reached.

7. On the question whether the conveying of the manure along the road in the manner aforesaid amounted to extraordinary traffic within 41 & 42 Vict. c. 77, s. 23, it was admitted that the road had not been prepared or metalled by the highway authority with a view to bearing traction engines, and was not in fact adapted to the weight of the appellants' trucks and engine, especially at the time in question, when the season was very wet.

If, however, it is necessary in point of law that the road should be repaired up to the standard contended for by the appellants as hereinafter mentioned, then the sessions found that the weights imposed upon it were not excessive.

8. It was proved that the carriage of farm materials and agricultural produce to and from farms by means of traction engines and trucks (such as those used in the present instance) is an ordinary incident of agricultural industry in the neighbourhood, and a usual mode of conveying such substances as the manure in question. On this particular road, however, a traction

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engine had been seen only on two occasions previously, and such engines had then in dry weather made a single journey for the purpose of taking an agricultural machine to a farm in the neighbourhood.

The appellants contended—1. That the traffic was not conducted by their order within the meaning of s. 23 of 41 & 42 Vict. c. 77, but by the order of Mr. Wigan. 2. That the carriage of manure and agricultural produce by traction engines having become a recognised incident of agricultural industry in the neighbourhood, the respondents are liable to keep all roads in their district up to the necessary standard of repair for such traffic, and that the traffic was not therefore extraordinary within the meaning of s. 23 of 41 & 42 Vict. c. 77.

The respondents contended—1. That the traffic was conducted by the order of the appellants. 2. That the traffic was extraordinary within the meaning of the section.

The sessions held that the traffic was conducted by the order of the appellants, and was extraordinary traffic with respect to the particular road or lane in question within the meaning of the section.

The questions for the opinion of the Court were—1. Whether or not the sessions were right in holding that the appellants were the persons by whose order the traffic was conducted; and if this question was answered in the affirmative, then, 2. Whether the sessions were right in holding that the traffic so conducted was extraordinary traffic within the meaning of the section.

G. Denman, for the appellants. First, the evidence that the traction engines were used by the order of the appellants was insufficient. But if this view is not adopted by the Court, it is submitted that it was the duty of the highway board to keep the road in repair, so as to provide for any natural change in the traffic. Even conceding that the passage of the loaded trucks upon the particular highway was de facto extraordinary traffic, the fact that it was usual upon the other roads of the parish and might at any moment be extended prevents it from being extraordinary so far as the liability of the appellants is concerned. In *Pickering Lythe East Highway Board* v. *Barry* (1), Lopes, J.,

(1) 8 Q. B. D. 59.

expresses his opinion that by "extraordinary," was meant something unusual in weight compared with what is usually carried over roads of the same nature in the neighbourhood, or as compared with that which the road in its ordinary and fair use may be reasonably subjected to; and that it would not be sufficient to compare the weight and traffic complained of with traffic usually carried on the particular road.

[BOWEN, J. I have had occasion to consider this passage in the judgment of my Brother Lopes, and I cannot adopt it to its full extent.]

The test is, whether the use of the particular vehicles is an ordinary incident of agricultural traffic in the neighbourhood. [He cited *Lord Aveland* v. *Lucas* (1); *Wallington* v. *Hoskins* (2); *William* v. *Davies*. (3)]

Kingsford, for the respondents, was not heard.

FIELD, J. I am of opinion that the order of sessions was right. As to the first question raised by the case, it is hardly necessary to say that there is sufficient evidence that the traffic was conducted by order of the appellants, so that the only question which remains is, whether this was extraordinary traffic within the meaning of the section. I at first thought that the justices had found in fact that it was extraordinary traffic. If this were the case, I see no reason to dissent from their finding, and we are bound by it. But if the question whether it is extraordinary traffic is an inference of law from the facts, we must consider the point, the authorities having already decided that the word "ordinary" must be interpreted with reference to the road in question. The facts before us are that the road is in a large agricultural district near a railway station. There are no doubt broad main roads which, so far as I know, may be and are repaired so as to bear the traffic in question. But there is also a particular road communicating with one of these main roads and principally used by farmers whose premises adjoin it. Over this road locomotives have gone very rarely and then in dry weather, but on the particular occasion a traction engine with loaded trucks made during

(1) 5 C. P. D. 211, 351. (2) 6 Q. B. D. 206.
(3) 44 J. P. 347.

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several days two journeys a day upon it with the result of practically squeezing the road into the ditch and seriously damaging it. Now, what reason can be suggested for inferring that this was ordinary traffic? It is urged that the use of traction engines is an ordinary incident of agricultural industry. But having regard to the character of this road and to the mode in which it was generally used, it is impossible to hold that the use of such engines was an ordinary incident of the traffic upon it. The justices were right.

BOWEN, J., concurred.

Judgment for the respondents.

Solicitor for appellants: *T. Southgate, for Gramshaw, Gravesend.*

Solicitors for respondents: *Beale, Hoar, Son, & Howlett, Maidstone.*

A. P. S.

March 11.

[IN THE COURT OF APPEAL.]

FERGUSSON *v.* DAVISON.

Practice—Costs—Reference of Action by consent—Costs to abide the Event—County Courts Act, 1867 (30 *&* 31 *Vict. c.* 142), *s.* 5.

By an order made by consent of the parties, an action on a building contract was referred to an arbitrator to ascertain the amount, if any, due from the defendant to the plaintiff, "the costs of the action, reference, and award, to abide the event." The arbitrator found the sum due to the plaintiff was 19*l.* 2*s.* 7*d.* upon which an order was made for judgment for the plaintiff for that sum, without costs:—

Held, that the plaintiff had recovered in the action by judgment a sum not exceeding 20*l.*, and that he was therefore deprived of his costs of the action by the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, unless he got a certificate or order for costs under that section.

Jones v. *Jones* (7 C. B. (N.S.) 832) overruled.

THE plaintiff brought an action in the District Registry of Newcastle-upon-Tyne, on a building contract, in which he claimed 24*l.* 1*s.* 11*d.*

By consent of the parties in September last the District Registrar ordered that the defendant should pay into court 15*l.* 14*s.* 7*d.*, which he admitted to be due to the plaintiff, and

that the action, and all matters in difference, should be referred to a practical man to be nominated by the plaintiff and defendant or their solicitors, and, in case of difference, by a registrar, to ascertain and fix the amount, if any, due from the defendant to the plaintiff — "the costs of the action, reference, and award, to abide the event." The arbitrator found that 3*l.* 8*s.* was due to the plaintiff beyond the 15*l.* 14*s.* 7*d.* paid into court, making in the whole 19*l.* 2*s.* 7*d.* due from the defendant to the plaintiff. The district registrar made an order for judgment for the plaintiff for the amount awarded, without costs, considering that the plaintiff was deprived of his costs by s. 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142). (1)

The plaintiff having appealed to Pollock, B., at chambers, and afterwards to a Divisional Court, without success, appealed to this Court.

Gainsford Bruce, for the plaintiff. In this case the order of reference was made by the consent of the parties.

[*A. T. Lawrence*, for the defendant, denied that it was by consent. The words "by consent" are not in the order, and it appears by the plaintiff's affidavit that the defendant appealed against the order being made.]

The order refers "all matters in difference" to an arbitrator to be nominated by the parties. It therefore could not have been made except by consent. Then *Jones* v. *Jones* (2) is an express decision in favour of the plaintiff, that where a cause before trial is referred by the agreement of the parties with a stipulation that the costs of the cause are to abide the event, and the event is determined in the plaintiff's favour by the arbitrator, the County Court Act does not apply, and he is entitled to the costs of the cause. The case of *Moore* v. *Watson* (3), it must be admitted, is against

(1) By 30 & 31 Vict. c. 142, s. 5, it is enacted that "if in any action commenced after the passing of this Act" "the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a Judge at chambers shall by rule or order allow such costs."

(2) 7 C. B. (N.S.) 832; 29 L. J. (C.P.) 151.

(3) Law Rep. 2 C. P. 314.

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the plaintiff being entitled to costs, but in that case there was a compulsory reference under the Common Law Procedure Act, 1854, and the decision, moreover, is disapproved of by Bramwell, L.J., in *Galatti* v. *Wakefield*. (1)

[BRETT, L.J. The decision in *Moore* v. *Watson* (2) was only on the right of the plaintiff to the costs of the reference, and it did not touch the question as to the plaintiff's right to the costs of the action.

HOLKER, L.J. How can the plaintiff be entitled to the costs of the action when the Act of Parliament says he shall not be entitled to them?]

The parties, instead of standing on their strict rights, have by agreement chosen to make the costs depend on the event. No doubt a distinction is drawn between the right to the costs of the cause and to the costs of the reference: *Galatti* v. *Wakefield* (1) and *Forshaw* v. *De Wette* (3), and the only case which decides the plaintiff's right to the costs of the cause is that of *Jones* v. *Jones*. (4)

A. T. Lawrence, for the defendant. *Jones* v. *Jones* (4) is, in effect, overruled by the Court of Queen's Bench in *Cowell* v. *Amman Colliery Company* (5), where that Court, after conferring with the judges of the Courts of Common Pleas and Exchequer, adopted as the rule what is stated by Bramwell, B., in *Smith* v. *Edge* (6), where, after reviewing, inter alia, *Jones* v. *Jones* (4), he states that the rule ought to be, "that wherever the plaintiff is entitled to judgment in the action and gets his damages in the action, and the case is such that if there had been no reference the plaintiff would, by virtue of the County Court Act, have lost his costs in the cause, so does he equally lose them when there is a reference which fixes the amount, unless he has succeeded in getting the necessary certificate."

[He was then stopped.]

BRETT, L.J. In this case an action was brought in the superior

(1) 4 Ex. D. 249.
(2) Law Rep. 2 C. P. 314.
(3) Law Rep. 6 Ex. 200.
(4) 7 C. B. (N.S.) 832; 29 L. J. (C.P.) 151.
(5) 6 B. & S. 333; 34 L. J. (Q.B.) 161.
(6) 33 L. J. (Ex.) 9.

Court and referred to an arbitrator, and I think we ought to take it that it was referred by consent, because it could not have been properly referred in the way it was, except by consent. By the terms of the reference the costs of the action are to abide the event. The arbitrator found that there was due to the plaintiff 19*l.* 2*s.* 7*d.*, and judgment was thereupon entered for the plaintiff for that sum. The question is whether the plaintiff is entitled to the costs of the action, or whether he is deprived of them by s. 5 of the County Court Act, 1867 (30 & 31 Vict. c. 142), and it seems to me that, without reference to any authority on the subject, he is, on the plain words of that section, deprived of such costs. That section says that, "if in any action" "the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract," "whether by verdict, judgment on default, or on demurrer or otherwise," he is not to have the costs of the action. In the present case the result is, that there is the judgment of the superior Court for the plaintiff for a sum less than 20*l.* That judgment, it is true, was obtained by means of a reference by consent, but it seems to me that the sum was recovered in an action by judgment, and that therefore the words of the section are sufficient to deprive the plaintiff of any costs of the action. Then as to the authorities. The only case in favour of the plaintiff is that of *Jones* v. *Jones* (1); all the others, including even that of *Moore* v. *Watson* (2), are against him. Now there had been a conflict of opinion in the Courts on this very point, when, in *Cowell* v. *Amman Colliery Company* (3), the judges of the Court of Queen's Bench did what was the practice of the judges in such an event, that is to say, they consulted the judges of the other Courts, and, having done so, they came to the conclusion that in such a case as the present the plaintiff was deprived of his costs, and the case of *Jones* v. *Jones* (1) was wrongly decided. Of course, after having stated what is my view of the statute, it is hardly necessary for me to say that I quite agree with the case of *Cowell* v. *Amman Colliery Company* (3), and therefore *Jones* v. *Jones* (1) is overruled.

(1) 7 C. B. (N.S.) 832; 29 L. J. (C.P.) 151.

(2) Law Rep. 2 C. P. 314.

(3) 6 B. & S. 333; 34 L. J. (Q.B.) 161.

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HOLKER, L.J. The application of the plaintiff is to have the costs of the action. I think that they cannot be recovered in consequence of the County Courts Act, 1867, because the words of that Act are quite clear, and I do not think that a party can contract himself out of the Act unless, at all events, he does it in language which is very express. With reference to the authorities, none has been cited in favour of the plaintiff except that of *Jones* v. *Jones* (1), and that, we find, has been distinctly overruled, so that the sheet anchor of the plaintiff is gone.

BRETT, L.J. I wish to add that our decison does not apply to the case in which an arbitrator has made an award under a reference where no action has been commenced.

Appeal dismissed.

Solicitors for plaintiff: *Pattison, Wigg, Gurney, & King.*
Solicitors for defendant: *Brownlow & Howe.*

W. P.

April 3.

[IN THE COURT OF APPEAL.]

JACKSON *v.* JOHN LITCHFIELD & SONS.

Practice—Action against Partnership Firm—Judgment—Order IX. r. 6, *and Order XLII. r.* 8.

Where the writ in an action is issued against a partnership firm in the name of the firm the judgment must be against the firm, and it cannot be separately entered against an individual member of the firm who has made default in appearing to the action.

9 QBD 338
10 QBD 440
11 QBD 436, 7

APPEAL from the refusal of the Queen's Bench Division to allow judgment to be entered for the plaintiff against James Litchfield, one of the partners of John Litchfield & Sons, the defendants in this action.

The action was brought for the detention of a brougham and for the wrongful levy of an execution on the goods of the plaintiff. The defendants were partners trading under the name or firm of John Litchfield & Sons, and the writ was issued against them in

(1) 7 C. B. (N.S.) 832; 29 L. J. (C.P.) 151.

the name of their said firm, and was served on George Litchfield, one of the partners, in accordance with Order IX. rule 6. It afterwards appeared, from an affidavit made by the said George Litchfield, that James Litchfield was a partner in the firm; but, although appearances to the action were entered for the other partners, no appearance was entered for James Litchfield, and thereupon the plaintiff moved to enter judgment against him for want of appearance. The Divisional Court, affirming the decision of a master and of a judge at chambers, refused the motion.

March 25. *Mugliston*, for the plaintiff, moved by way of appeal from such refusal, that judgment should be entered for the plaintiff against James Litchfield. It is shewn by the affidavits that James Litchfield is a partner of the firm, and that he was such when the cause of action arose. According to Order IX. r. 6, where partners are sued in the name of the firm, the writ may be served as it was here upon any one of the partners, "and such service shall be deemed good service upon the firm." The effect therefore is the same as if James Litchfield had been personally served. It is true that this Order IX. r. 6 does not apply to proceedings against a partner under the Bills of Exchange Act, in which personal service is strictly required: *Pollock* v. *Campbell*. (1)

In *ex parte Young* (2), Young had ceased to be a member of the partnership before the action was brought, and therefore it was thought that he might not have had notice of the action by service of the writ on the other partners. That reasoning, however, does not apply here, for James Litchfield has actually entered an appearance to this action as administrator for a deceased partner, so he cannot be ignorant of this action. By Order XIII. r. 6, "where the defendant fails to appear to the writ of summons, and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered." If that rule does not apply, then by rule 9 of the same order the action may proceed

(1) 1 Ex. D. 50. (2) 19 Ch. D. 124.

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as if the party served with the writ had appeared. According to Order XII. r. 12, where partners are sued in the name of their firm, they are to appear individually in their own names. Order XVI. r. 10 enables partners to be sued in the name of their firm, and enables the plaintiff to obtain by judge's summons the names of the persons who are partners.

[BRETT, L.J. Is it not a general rule that the judgment should follow the writ? Is there any judicature order or rule as to entering judgment where partners are sued in the name of the firm?]

No; but Order XLII. r. 8 (1) states how execution is to issue.

No one appeared for James Litchfield.

Cur. adv. vult.

April 3. BRETT, L.J. In this case an action was brought for the detention of a brougham, and for the wrongful levy of an execution on the goods of the plaintiff. The writ was issued against a partnership firm in the name of the firm, and was served in accordance with the rule and order on one of the partners. Appearance was entered for all the partners but one, namely James Litchfield. The usual proceeding was taken for the discovery of those who were members of the partnership, and the result was an affidavit by one of the partners, in which it was stated that amongst others James Litchfield was a partner, and indeed it is not denied that he was a member of the firm. No appearance to the action was entered for James Litchfield, and

(1) Order XLII. r. 8: Where a judgment is against partners in the name of the firm, execution may issue in manner following:—

(*a*) Against any property of the partners as such.

(*b*) Against any person who has admitted on the pleadings that he is or has been adjudged to be a partner.

(*c*) Against any person who has been served as a partner with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do; and the Court or judge may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

thereupon and therefore the plaintiff moved to sign judgment against him separately for want of appearance. The Divisional Court refused to allow this to be done, and in my opinion the Divisional Court were right, and that such judgment under the circumstances cannot be signed.

I think, whether the writ is to be considered as having been personally served on James Litchfield or not, that as it was against the firm in the name of the firm, judgment must be entered against the firm only. For the solution of this question one must look at the Judicature Orders and Rules, since a proceeding against a firm by the firm's name was not known at common law; and it is a new proceeding. At common law there were no means of suing or of obtaining judgment against a firm as such; it was necessary that the members of it should be sued individually, and therefore we must examine the Judicature Orders and Rules to see how, in such a case as the present, judgment is to be signed.

I wish to state what I consider to be a canon or rule of construction for a guide in such a matter, and it seems to me that the following rules are true, that in all cases at common law, which are not provided for by the Judicature Acts, the proceedings are to be as they were before those Acts, and that in all cases within the Judicature Acts, where no special steps in proceedings are provided, the proceedings are to be as nearly like as they can be to analagous proceedings before those Acts.

Now to apply these rules to the present case. The first order and rule to which it is necessary to refer is Order IX. r. 6. [The learned Judge here read that rule.] In my opinion, service of a writ under that rule is, for the purpose of obtaining judgment, made service on every member of the firm. Then the next material order and rule is Order XLII. r. 8. It begins by saying "where a judgment is against partners, in the name of the firm, execution may issue in manner following." [The learned Judge here read the rest of that rule.] There is no rule or order as to how judgment is to be entered where the writ is against the firm, therefore the way in which it is to be entered must be determined according to the canon rules of construction which I have enunciated. The rule at common law is that the judgment must

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follow, or accord with the writ. Under the Judicature Act, and its orders, the writ may be against the firm. Therefore by analogy the judgment must be against the firm.

After the writ has been issued against the firm, it can be ascertained by discovery who are the members of the firm, and where one who has been ascertained to be a member does not appear to the action, the proper course is to proceed nevertheless against and to obtain judgment against the firm. Nothing can be done until that has been done, for the writ being against the firm, the judgment must be against the firm. The only mode of putting such judgment into execution is by proceeding under Order XLII. r. 8. That rule provides that execution may issue "against any person who has been served as a partner with the writ of summons and has failed to appear." It is not necessary to determine now whether such service for such purpose must be personal, though I still incline to think it must be.

Upon the judgment against the firm execution may issue without more against the firm, and against each member of it who has appeared. The subsequent part of r. 8, seems to apply to the case of a partner not discovered at the time, or who has not appeared, and in either case the plaintiff must first apply for and obtain the leave of the Court or judge.

However, in the case now before us it is not a question of execution, but only whether judgment can be entered against a partner who has made default in appearing to the action. It does not raise the point which was before the Court in *Ex parte Young* (1), where the question was as to which partnership firm the Judicature Orders and Rules applied. I thought in that case that they applied to the firm which was existing at the time the debt was incurred, and though I hardly think that the Lord Chancellor differed from me as to that, yet certainly Cotton, L.J., did. But no such question is here raised since James Litchfield was a member of the firm as well at that time, as when the writ was issued.

In my opinion the judgment in this action must follow the writ and be against the firm, and then execution may issue against the firm, and against every individual member of it, either

(1) 19 Ch. D. 124.

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without or after leave given to do so. Therefore the decision of the Divisional Court was right, and the application for leave to sign judgment must be refused.

HOLKER, L.J. I am of the same opinion.

Motion refused.

Solicitor for plaintiff: *J. Andrews.*

W. P.

[IN THE COURT OF APPEAL.]

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April 30.

SPARROW *v.* HILL AND ANOTHER.

Practice—Costs, Taxation of—Plaintiff succeeding upon One Item out of Three of his Claim—Apportionment of Costs under special Order.

The plaintiff sued for three items of a claim for work done, and recovered a sum in respect of one of such items only. By an order of the Court it was ordered "that the plaintiff recover against the defendants" that sum, "and such costs as one of the masters may find that he has rightly incurred in recovering the above amount, and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded, to be also taxed."

On taxation the master allowed the plaintiff the general costs of the cause, disallowing only those which applied exclusively to the parts of his claim on which he failed; and he allowed the defendants such costs only as were incurred by them by reason of the two items of claim which they successfully resisted:—

Held, reversing the decision of the Queen's Bench Division, that the master had construed the order rightly, and had taxed the costs on the right principle.

APPEAL by the plaintiff from the decision of the Queen's Bench Division ordering the master to review his taxation of costs. The facts, including the special order with reference to the costs, the taxation, the grounds of the defendant's objection to such taxation, and the answer of the master with the principle on which he had taxed are fully set out in the report of the case in the Queen's Bench Division. (1) For the purposes of the present report they sufficiently appear in the head-note.

Buszard, Q.C., and *Dugdale*, for the plaintiff.

Graham, for the defendants. The following authorities were

(1) 7 Q. B. D. 362.

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cited: *Field* v. *Great Northern Ry. Co.* (1); *Hardy* v. *Hull* (2); *Knight* v. *Purssell* (3); *Mason* v. *Brentini* (4); *Myers* v. *Defries* (5); *Heighington* v. *Grant* (6); and Seton on Decrees, vol. i. 4th ed. p. 117.

BRAMWELL, L.J. I interpret this order to mean that the plaintiff is to get the general costs of the action, but not the costs of attempting to recover the items of claim as to which he failed. I think the defendants are to have such costs as they incurred in defending themselves against claims which were unfounded. The case is to be treated as if there had been a certain issue found for the plaintiff, with judgment for him, and certain other issues found for the defendants, and that, in my opinion, is what is meant by this order. The master has rightly taken this view of it, although I think he has been rather illiberal in his allowances to the defendants. The appeal, therefore, must be allowed.

BRETT, L.J. It seems to me that the whole of Mr. Graham's argument is that, since the Judicature Acts, costs in any action are to be dealt with just as costs used to be in a Chancery suit. He cited cases to shew that there were only two forms of orders as to costs in a Chancery suit, and which were interpreted in a particular way. The fact is there were costs applicable to a common law action, and there were costs applicable to a Chancery suit, and they were different from each other, because the subject-matter of each was different, and it was necessary that they should be differently dealt with, and there is nothing in the Judicature Acts to alter this, and therefore when an action in the High Court is in a Common Law Division, the only proper way of dealing with the costs is to treat the action as if it were a common law action. But, however, be that as it may, no cases or authorities can help us in construing this order, and the question we have now to determine is what is its meaning? The action was for one cause of action consisting of three

(1) 3 Ex. D. 261.
(2) 17 Beav. 355.
(3) 49 L. J. (Ch.) 120.
(4) 15 Ch. D. 287.
(5) 4 Ex. D. 176.
(6) 1 Beav. 228.

items of claim, and the defence raised only one issue, and on that the plaintiff succeeded, but only as to part of his claim, that is to say, as to one of the items, and he failed as to the others. The order, therefore, is in this form:—[The learned judge here read it.] It is entirely a new form of order, and one sui generis. I think this order was intended to obviate the difficulty of there being only one issue, and it meant that the costs were to be taxed, not as if there were but one issue only, but as if there were three several issues, on one of which the plaintiff had succeeded, and on the other two the defendants. It seems to me that the master thought so, and that he has taxed on that footing. I agree with Lord Justice Bramwell and I should have allowed something more to the defendants than the master has done, but in this he has not done anything so wrong that we should interfere, and being, as I am of opinion that he was, right in the construction he has put upon this order, the order of the Divisional Court is, I think, wrong.

COTTON, L.J. I am of the same opinion. The judges of the Divisional Court seem to have thought that this case was the same in principle as that of *Knight* v. *Purssell* (1), but that assumes that the order in this case is the same as was the order there, which it is not. It differs entirely from it. The question which we have to consider is what does the order in the present case mean. It does not give a portion of the costs of this action to one of the parties and a portion of them to the other, but in my opinion it gives the general costs of the action to the plaintiff except such as were incurred with reference to the unfounded part of his claim, and which the defendants are to get. The master, therefore, I think, acted on a right principle.

Appeal allowed.

Solicitors for plaintiff: *Walker, Son, & Field, for Smith & Howe, Wednesbury.*

Solicitors for defendants: *Taylor, Hoare, & Taylor, for Maples & McCraith, Nottingham.*

(1) 49 L. J. (Ch.) 120.

W. P.

1882
March 15.

[IN THE COURT OF APPEAL.]

KEEN *v.* THE MILLWALL DOCK COMPANY.

Employer's Liability Act, 1880 (43 & 44 *Vict. c.* 42), *ss.* 4, 7—*Notice of Injury —Written Notice necessary—Sufficiency of Notice.*

9 QBD 389
12 QBD 43

The notice of injury sustained by a workman which is to be given to an employer under the Employer's Liability Act, 1880 (43 & 44 Vict. c. 42), must contain in writing all the particulars required by s. 7, in order to fulfil the condition precedent to bringing an action enacted by s. 4.

Query, if such notice can be made by one writing referring to another writing.

Where a workman, on the day he had been injured, made a verbal report of such injury to his employer's inspector who took down the details in writing and sent them to the employer's superintendent, and afterwards the workman's solicitor wrote a letter to the employer, stating that he was instructed by such workman to apply for compensation for injuries received on the employer's premises, "particulars of which have already been communicated to your superintendent":—

Held, that such letter did not refer to any other writing, and was not a notice in compliance with the Act.

ACTION in the Bow County Court, which was brought under the Employer's Liability Act, 1880 (43 & 44 Vict. c. 42), for damages for injuries sustained by the plaintiff whilst acting under the orders of the defendants' foreman, and through the alleged negligence of such foreman.

The defendants relied on no notice of such injuries having been given to them pursuant to sects. 4 and 7 of the Employer's Liability Act, 1880. (1)

(1) By s. 4, of 43 & 44 Vict. c. 42, "An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained, is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of death: Provided always that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice."

By s. 7: "Notice in respect of an injury under this Act, shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or if there is more than one employer upon one of such employers. The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to

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The accident, which occasioned the injuries in respect of which the action was brought, occurred on the 31st of May, 1881, and on the same day a verbal report of it was made by the plaintiff to the defendants' inspector, Mr. Reed, who took down in writing the details, and afterwards on the same 31st of May sent a memorandum of them to Mr. Campbell the superintendent of the defendants. On the 7th of June following, Mr. Bradley, who was then the plaintiff's solicitor, wrote to the secretary of the defendants the following letter:

"7 June, 1881.

"Sir,

"I am instructed by George Keen, of 136, Rhodeswell Road, Limehouse, to apply to you for compensation for injuries received at your dock, particulars of which have already been communicated to your superintendent. I shall be glad to hear from you on the subject.

"Yours faithfully,

(Signed) "Henry Bradley."

At the trial it was contended on behalf of the plaintiff, that the above facts and letter shewed a sufficient notice in compliance with the requisites of the statute. The county court judge held that there had been no sufficient notice, and nonsuited the plaintiff.

Application for a rule nisi to set aside the nonsuit and for a new trial was refused by the Queen's Bench Division, but with leave to appeal.

The plaintiff appealed accordingly.

Crispe, for the plaintiff. The notice was sufficient. It is true

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be served. The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served at his last known place of residence, or place of business; and if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered." . . . "A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice, shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

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that it has been held that the notice must be in writing: *Moyle* v. *Jenkins* (1), but the section is only directory, and the notice is not to be deemed invalid by reason of any defect or inaccuracy. Notice is therefore sufficient where, as here, by reference to what had been already communicated, the requirements of the enactments as to the cause and particulars of the injury have been substantially fulfilled.

LORD COLERIDGE, C.J. I am of the opinion that the rule applied for in this case must be refused. This is the first time that this Court has had to put an interpretation on the fourth section of the Employer's Liability Act, which is an Act that has considerably extended for the benefit of workmen the law as previously existing, and has given them a remedy against their employers for injuries sustained while in their employers' service, which the workmen would not otherwise have had. In giving such remedy the statute has, however, limited its operation by saying in terms, that an action under this Act "shall not be maintainable unless notice that injury has been sustained is given within six weeks" "from the occurrence of the accident causing the injury." What then is the notice which will satisfy that enactment? I agree with the Court in *Moyle* v. *Jenkins* (1), that if the question depended on the fourth section alone, much might be said in favour of a verbal notice being sufficient, but the fourth section does not stand alone, and the seventh section which must be read with it says this. [His Lordship here read the 7th section.] The words there are apt only to a written notice, and it is clear I think that that section cannot be fairly fulfilled, except by the notice being in writing. It has been argued that a notice to satisfy this enactment can be made by a reference in it to some other document. In my opinion it cannot. If the letter relied on in this case had referred to some written document in which the nature and particulars of the injury were given it would not, I should have thought, have been a compliance with the words of this enactment, which describe the notice as one and single, containing in it the incidents which the statute has required it to contain as a condition precedent to maintaining any action.

(1) Ante, p. 116.

This, however, is only my own opinion, and the point is one which it is not necessary to determine in the present case, as we are all agreed that the letter of the plaintiff's solicitor which is here relied on does not incorporate with it, or refer to any written document, and is clearly not a notice in compliance with the requisites of the Act.

BRETT, L.J. I am of opinion that in this case the condition precedent to bringing the action has not been complied with. It seems to me that there must be a notice in writing of the injury sustained, that it must be served on the employer, and given within six weeks from the occurrence of the accident, that it must be a notice that injury has been sustained, and must contain certain particulars such as the cause of the injury, and date at which it was sustained. It must give also the name and address of the person injured, but it need not be signed by any one. However the notice under this Act is not to be deemed invalid by reason of any defect or inaccuracy unless the Judge who tries the action is of opinion that the defendant is prejudiced by it, and that the defect or inaccuracy was for the purpose of misleading. It seems, therefore, to me that a notice might be available even if it should be defective in any of the matters required to be stated, as for instance, if it did not in terms name the day when the injury was sustained, but shewed it by reference, so also if it did not describe the cause of the injury with sufficient particularity but still did not describe it so as to mislead. I agree that as a general rule the notice must be given in one notice, but I am not prepared to say that it would be fatal if it were contained in more than one notice. Suppose for example a person in his letter written on one day should describe fully the injury he had sustained, but should leave out his address, and he should the next day send a letter stating that in the letter I wrote yesterday I omitted to give you my address, and I now give it. If both these letters were written in time, and both served on the employer, I am not prepared to say that the last might not be taken to incorporate the first, and therefore, though not an accurate but an informal notice, it might be considered a notice within the meaning of the statute. If in the present case the letter of Mr. Bradley

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had referred to a written report, and to the date and particulars there given of the injury, I should not at this stage have said that there had not been a notice within the Act, but should have desired a rule in order that the matter might be more fully discussed. The letter, however, only refers to a statement in words supposed to have been given by the plaintiff to the defendants' inspector and not to a statement in writing, and is therefore not a notice within the Act which in order to be such must I agree contain all the circumstances in writing.

HOLKER, L.J. I agree with my Lord, and on the same grounds which he has given that there was no sufficient notice, in this case. But I cannot say that a good notice might not be made out by one written document referring to another.

Rule refused.

Solicitors for plaintiff: *Noon & Clarke.*

W. P.

March 15.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF THE EAST HAM LOCAL BOARD *v.* BARCLAY AND ANOTHER, JUSTICES OF ESSEX.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 211—*Owner rated instead of Occupier—Rate in respect of Tenements whether occupied or unoccupied—Reduced Estimate—Proportion of annual Value.*

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, the owner instead of the occupier may, at the option of the urban authority, be rated to general district rates, provided that in cases where the owner is rated instead of the occupier he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of the net annual value; and where such reduced estimate is in respect of tenements whether occupied or unoccupied, then such assessment may be made on one half of the amount at which such tenements would be liable to be rated if the same were occupied, and the rate were levied on the occupiers:—

Held, affirming the decision of the Queen's Bench Division, that a discretionary power is given to the urban authority by that enactment to rate the owner in respect of premises whether occupied or unoccupied, but where the owner is so rated the assessment must only be upon one half of the rateable value.

APPEAL from a decision of the Queen's Bench Division refusing a rule for a mandamus, commanding two justices of Essex to issue

a distress warrant against the goods of Richard Weaver to levy 6*l.* 15*s.*, the arrears of a general district rate made for East Ham, Essex, on the 9th of November, 1880. (1)

It appeared that the East Ham Local Board which is an urban authority within the meaning of the Public Health Act, 1875 (38 & 39 Vict. c. 55) (2), having made a rate for general district purposes under that Act, passed a resolution that the owners of property let upon monthly or weekly tenancies should be rated instead of the occupiers; that they be rated whether occupied or unoccupied, and that they be rated at two-thirds of their rateable value. On the 9th of November, 1880, a rate was made on Richard Weaver in pursuance of this resolution, by which he was rated in respect of twenty-seven cottages of which he was owner at two-thirds of their rateable value. Twenty of these cottages were unoccupied. The justices being of opinion that s. 211 of the Public Health Act, 1875, did not enable the local board to assess at two-thirds of their annual rateable value tenements in respect of which the owner was rated whether occupied or not, refused to order a distress warrant to issue in respect of arrears of the rate so made on Richard Weaver. A rule nisi for a mandamus to the justices to issue such warrant having been obtained was afterwards discharged by the Queen's Bench Division.

The prosecutors appealed.

Day, Q.C., and *Tindal Atkinson*, for the appellants. The 211th section of the Public Health Act, 1875, has drawn a clear dis-

(1) Ante, p. 306.

(2) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1, general district rates are to be made and levied on the occupiers subject to the following exceptions: "the owner instead of the occupier, may at the option of the urban authority, be rated in cases where the rateable value of any premises liable to assessment under this Act does not exceed the sum of 10*l.*; or where any premises so liable are let to weekly or monthly tenants; . . . Provided that in cases where the owner is rated instead of the occupier, he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of the net annual value; and where such reduced estimate is in respect of tenements whether occupied or unoccupied, then such assessment may be made on one-half of the amount at which such tenements would be liable to be rated if the same were occupied, and the rate were levied on the occupiers."

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tinction between what is imperative and what discretionary in the power of the urban authority under that enactment. It says that "the owner instead of the occupier *may*, at the option of the urban authority, be rated" in certain cases there specified, and afterwards it goes on to provide that in cases where the owner is rated instead of the occupier he *shall* be assessed on such reduced estimate as the urban authority deem reasonable, not being less than two-thirds nor more than four-fifths of the annual value, and then it goes on to say "and where such reduced estimate is in respect of tenements, whether occupied or unoccupied, then such assessment *may* be made on one-half" the value. The Queen's Bench Division have decided that the word "may" in that last part must be read as "must." That is a wrong construction. The intention of the legislature is, in the case of rating the owner in respect of unoccupied premises, to substitute one-half for two-thirds of the value given in the previous part as one of the limits at which the owner is to be assessed, so that in the case of unoccupied premises, there is a discretionary power in the urban authority to make the assessment on the owner as low as one-half, as well as high as four-fifths of the value. They may make it as low as one-half, but they are not compelled to do so. The Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 4, which enables the owner to be rated whether the premises be occupied or not, gives power to the overseers to allow the owner in such case a deduction not exceeding 30 per cent., but the legislature has never gone so far as to compulsorily reduce it to one-half.

No one appeared for the respondents.

LORD COLERIDGE, C.J. I am of opinion that the judgment of the Queen's Bench Division is correct, and I think that the Poor-rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), to which Mr. Atkinson has referred, supports such decision.

The 211th section of the Public Health Act, 1875, gives a general power to the urban authority at its option to rate the owner instead of the occupier. It follows that that applies only to the case where there is an occupier, and in that case where the owner is rated he is to be assessed on such reduced estimate as the

urban authority deem reasonable, not being less than two-thirds nor more than four-fifths of the annual value. The section then goes on to deal with what is a very common case with reference to the collection of rates in respect of small tenements, which may from time to time be occupied or unoccupied as may happen where the lettings are for short periods, and which are so inconvenient for rating purposes that if there were no power to rate the owner the general district would often suffer. This is met by the power under which the owner may be rated irrespectively of the occupier, whether the tenements are occupied or unoccupied, but then inasmuch as he may be constantly paying the rate in respect of tenements from which he is receiving no rent he *shall* be rated only on an assessment on one half the rateable value. As the urban authority will in that case be getting the rate regularly, whilst the owner may be getting his rent irregularly, it seems to me to be extremely just that the rating should be on such a reduced estimate, if the words of the enactment will allow such construction, and in my opinion they will. The enactment is to be read, I think, as enacting that in respect of tenements, whether occupied or unoccupied, the reduced estimate *may* be made, but then on one half of the amount at which such tenements would be rated if the rate were levied on the occupier. That makes the section intelligible and just, and I think such construction is aided by s. 4 of the earlier Act, 32 & 33 Vict. c. 41, in which the same distinction is preserved, though the amount is different. There, where the owner is rated instead of the occupier, he may be allowed a reduction of 15*l.* per cent., and where he is willing to be rated, whether the premises are occupied or not, he may be allowed a reduction of 30*l.* per cent.

BRETT, L.J. I think that both the reason of the thing and the expression of the enactment support the decision of the Divisional Court. What has been done here by the urban authority in rating the owner has been done altogether without his consent. I think it is clear that the earlier part of the 211th section applies to the case where there is both an owner and an occupier. Now whether the owner shall or not be rated instead of the occupier is

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discretionary and not imperative, and in describing the power given to the urban authority to rate the owner instead of the occupier, the word "may" is used. But when the urban authority has exercised that discretion, the limitation at which the owner may be rated is imperative, and he is only to be rated within the limits of two-thirds and four-fifths of the annual value, and therefore the word "shall" is used. Now if the power of rating the owner was confined to the first part of sub-s. 1 of s. 211, where the owner may be rated instead of the occupier, it is clear that the owner could never be rated where there was no occupier. But in the latter part of that sub-section the legislature was desirous of giving the urban authority power to rate the owner in respect of unoccupied tenements, and accordingly that part of the sub-section provides that the urban authority *may* rate the owner of tenements whether occupied or unoccupied. A discretionary power to do so is given, and if the legislature had repeated the form used in the former part of that enactment it would have said that the owner of tenements, whether occupied or unoccupied, may, at the option of the urban authority, be rated, but instead of doing this, it has for shortness, left only the word "may." Then, if in the exercise of its discretion, the urban authority resolve to rate the owner in respect of tenements, whether occupied or unoccupied, what is the limitation at which the assessment is to be made? It would have been as well if the legislature had used the same form as it has used with regard to rating the owner instead of the occupier, but it has not done so. It has only said that then such assessment may be made; on what? on one half of the amount of the rateable value. It would have been better if following the former form it had said that such owner *shall* then be assessed at one half, but it equally means, I think, that the limitation at which the assessment is to be made is as imperative as in the former case where the owner is rated instead of the occupier, only instead of the limitation being between two limits there is only one limit, namely, one half of the rateable value. So that although therefore an option is given to the urban authority, whether the owner is to be rated in respect of tenements occupied or unoccupied, no discretion is given as to assessing him in that case on any estimate between

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one half and any other portion of the value, but it must only be on one half of the rateable value.

HOLKER, L.J. In cases in which the owner is to be rated in respect of tenements which are unoccupied it would be unreasonable if there were a power to rate him on as high a value as when he is rated instead of the occupier. When the tenements are occupied, the assessment at which the owner may be rated may reach as high as four-fifths of the value, but it would not be reasonable that it should be at the same amount where the tenements are unoccupied, and I think that the intention of the legislature was that where the owner is rated in respect of unoccupied tenements the assessment shall be only on one half of the value.

Appeal dismissed.

Solicitors for prosecutors: *Wilson & Son.*

W. P.

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March 20.

Defamation—Justification—Evidence of Plaintiff's general bad Character—Rumours of Plaintiff having committed Offences charged in Libel—Mitigation of Damages—Facts not stated in Pleadings—Order XIX., r. 4.

Action for a libel alleging that the plaintiff, a theatrical critic, had endeavoured to extort money by threatening to publish defamatory matter concerning a deceased actress.

Defence—that the allegation was true in substance and fact:—

Held, by Mathew, and Cave, JJ., that evidence of rumours before the publication of the libel that the plaintiff had committed the offences charged in it, and evidence of particular facts and circumstances tending to shew the misconduct of the plaintiff as a theatrical critic could not be admitted in reduction of damages.

Held, further, that assuming such evidence to be material it was rightly rejected, for the particular facts and circumstances were not stated or referred to in the pleadings as required by Order XIX., r. 4.

STATEMENT OF CLAIM. That plaintiff was a dramatic critic engaged in that capacity in connection with "*The Daily Telegraph*" newspaper, and the proprietor of a monthly magazine called "*The Theatre*;" that defendant was the proprietor and publisher of a weekly paper called "*The Referee*." That defendant published of the plaintiff in his occupation of a journalist and dramatic critic

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in "*The Referee*" the words following—(setting out an article extracted from the paper), meaning that the plaintiff had obtained from Admiral Carr Glyn 500*l.* under a threat of publishing facts injurious to the memory of Miss Neilson (an actress), and systematically abused his position as a dramatic critic and a journalist for the purpose of extorting money.

The fourth paragraph of the statement of defence stated that the allegations in the article were true in substance and in fact.

Reply joining issue.

The action was tried in November, 1881, at Westminster before Lord Coleridge, C.J., and a special jury, when the plaintiff's counsel called witnesses to refute the charge contained in the libel. These witnesses were cross-examined by the defendant, and in the course of the cross-examination questions were put with the object of shewing that, apart from the particular libel, the plaintiff's magazine was conducted in a discreditable manner. It further appeared that before the trial a large number of interrogatories had been administered by the defendant to the plaintiff with the same object. The plaintiff's case having been closed without calling the plaintiff, he was called by the defendant's counsel and questioned at great length with regard to his general conduct of the magazine. Questions were put to him and to witnesses afterwards called by the defendant which were disallowed by the learned judge. These questions are set out in the judgment of Cave, J. The jury ultimately found a verdict for the plaintiff, damages 1500*l.*

A rule having been obtained calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had, on the ground that the learned judge at the trial improperly refused to receive evidence relating to the character of the plaintiff, and also evidence to shew that rumours existed prior to the publication of the libel, to the same effect as the matters complained of,

Feb. 28; March 1. *C. Russell, Q.C.* (*F. O. Crump*, with him), shewed cause.

Willis, Q.C., and *Moloney* (*Macdonell*, with them), in support of the rule.

The nature of the arguments upon the rule and the cases cited will be found in the judgment of Cave, J.

The counsel for the defendant also referred (with reference to the admissibility of evidence of general bad character, in reduction of the damages for libel), to Townshend on Libel, 3rd ed. (New York), s. 406, p. 677.

Cur. adv. vult.

March 20. The following judgments were delivered:—

MATHEW, J. This was an action brought for publishing in a paper called "*The Referee*" a libel imputing to the plaintiff that by threatening to publish in a journal called "*The Theatre*" defamatory statements with reference to a deceased actress, he had extorted a sum of 500*l.* from Admiral Glyn.

The case was tried before the Lord Chief Justice and a special jury, when the defence set up was that the alleged libel was true. The jury returned a verdict for the plaintiff, damages 1500*l.*

A rule was afterwards obtained by Mr. Willis to set the verdict aside, on the ground that the Chief Justice had refused to admit evidence of rumours, before the publication of the libel, that the plaintiff had been guilty of the misconduct imputed to him, and also had declined to permit the defendant to give evidence of previous acts of the plaintiff, which were said to have been of a discreditable character.

It was urged for the defendant upon the argument of the rule that, even upon the assumption that the libel in question was false and malicious, it was open to the defendant to attack the character of the plaintiff with a view to reducing the damages. This it was said might be accomplished either by calling witnesses to shew that before the libel was published they had been told that the plaintiff was guilty of the misconduct charged against him, or by giving evidence of any acts of the plaintiff in the course of his life from which the jury might infer that he was not a person of good conduct or reputation, and therefore ought not to be compensated in damages as if he were.

The learned counsel for the defendant did not insist upon the right to disparage the character of the plaintiff in reduction of damages as one peculiar to publishers of newspapers, but he

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Mathew, J.

claimed it on behalf of all persons who were shewn to the satisfaction of a jury to have published what was defamatory, and who had failed in the attempt to prove a justification.

It was treated as a matter too clear for argument that evidence of such rumours about a plaintiff's conduct ought to influence the minds of a jury in reduction of the damages, even though the rumours were admitted to be false, and it was insisted that the defendant might give the evidence in the course of the case, although the effect would be to make it extremely difficult for a jury to discriminate between evidence which might appear to be, but which was not legitimate proof of the truth of the libel, and that which was offered merely in reduction of damages.

Now, if rumours of the truth of the libel might be proved in reduction of damages, it would seem to follow that rumours of any other misconduct on the part of the plaintiff ought also to be admitted.

In each case the jury might infer that the plaintiff was not a person of good character, and the evidence would therefore become relevant in mitigation of damages; but this extreme view of the defendant's right was not insisted upon by Mr. Willis.

The contention that for a similar purpose any previous misconduct of the plaintiff might be proved was referred to the same supposed rule of law.

It was pointed out on behalf of the plaintiff that if the defendant were right a plaintiff in an action for libel would be placed in a position of great difficulty, for he might not be prepared to meet charges of which he would have had no notice, and an unscrupulous or vindictive defendant might thus make use of the action brought to clear the plaintiff's character to heap calumnies upon him as unfounded as the original libel. The result would be that a court of law would be less dreaded by the worst libellers than by their victims, for few men would face a trial at the risk of having to encounter charges which the malicious ingenuity of the defendant might render it almost impossible to meet. Thus a man of the highest reputation in his own country, who had been cruelly libelled, might be charged with having done something many years before, and in another country, while it would be practically out of his power to disprove the charge by any other evidence

than his own testimony, and this the jury might be asked to disbelieve.

It was not disputed by the counsel for the defendant, when pressed with these considerations, that where such evidence was offered on behalf of the defendant, it might be reasonable to permit the plaintiff to call witnesses to contradict the witnesses for the defendant, and if the plaintiff were not able to do so at once it was pointed out that the Court possesses a power to adjourn any trial in order that further evidence may be obtained, and that this power would doubtless, in a proper case, be exercised in the plaintiff's favour.

When it was pointed out for the plaintiff that such a course must inflict grievous hardship, the counsel for the defendant insisted that considerations of hardship were not admissible in discussing the question, because, as he maintained, the law upon the subject was settled, and must continue to be enforced.

In support of his contention Mr. Willis mainly relied on the case of *Leicester* v. *Walter* (1), a decision which, he asserted, was recognised by writers of authority on the subject of defamation, to several of whose works he referred.

I have had the advantage of seeing the judgment which my Brother Cave is about to deliver, and I agree with him in the conclusions at which he has arrived after a careful examination of the cases. I think that under our old system of pleading the more weighty authority was in favour of the admissibility of general evidence of bad character, even though no notice were given to the plaintiff of the intention to raise any such issue. I do not think that evidence of rumours that the plaintiff had done what was charged against him in the libel, or of particular acts of misconduct, would have been admissible. But I rest my judgment in this case upon the consideration that the authorities relied upon by Mr. Willis have no application to the pleadings which have been prescribed by the Judicature Acts.

Under our new procedure a statement of the material facts upon which the defendant intended to rely ought to have appeared in his pleadings. But there had been no notice upon the statement

(1) 2 Camp. 251.

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of defence in this case that evidence would be offered at the trial of the matters with respect to which the ruling of the Lord Chief Justice is complained of, and on this ground I am of opinion that the evidence was properly rejected.

A further ground upon which the rule was opposed by Mr. Russell was this, that under Order XXXIX., rule 3, even upon the assumption that the evidence should have been admitted, a new trial ought not to be granted unless the defendant could shew that some substantial wrong had been done him.

The particular acts of misconduct which were sought to be proved at the trial, and with reference to which the evidence was rejected, arose out of the plaintiff's relations to two newspapers, "*The Daily Telegraph*" and "*The Hornet.*"

It was asserted that the plaintiff had published in "*The Daily Telegraph,*" in the year 1878, a hostile criticism on an actor with whom it was alleged he had quarrelled. The only information before this Court with respect to the article was the statement of counsel that he had read it and that it was severe.

I cannot say upon this information that any substantial wrong was done the defendant within the meaning of Order XXXIX., rule 3, by the rejection of this evidence.

With respect to "*The Hornet,*" it was said that the plaintiff had instituted in 1873 a prosecution against that paper from which he had withdrawn under discreditable circumstances. But this evidence was withdrawn by Mr. Willis at the trial, and I understood it to have been admitted in the course of the argument that there was no such rejection of the evidence by the Lord Chief Justice as amounted to a mis-direction.

With respect to the rumours which the defendant was prevented from giving in evidence, I may add that I am not satisfied that any substantial wrong has been thereby done the defendant, for the defendant was not prepared to shew that the rumours were believed.

The heavy damages would seem to be due to the vindictive spirit in which the action was defended. For this the jury appear to have thought that the defendant deserved to be punished in an exemplary manner. I see no reason to think that the rejected evidence would have had any effect in inducing the jury to take a

more indulgent view of the defendant's conduct towards the plaintiff.

The rule must be discharged.

CAVE, J. In this case the defendant claims a new trial on the ground that the Lord Chief Justice misdirected the jury in rejecting 1, evidence of the plaintiff's general bad character; 2, evidence that rumours to the same effect as the libel complained of were in general circulation before the publication of the libel.

The action was for a libel published by the defendant of the plaintiff, alleging that the latter had extorted a sum of 500*l.* from Admiral Carr Glyn, by threatening to publish defamatory matter of Miss Neilson, an actress, then lately dead.

The questions which were rejected consisted in part of questions put to the plaintiff who was called by the defendant as his own witness, and in part of questions put to other witnesses called by the defendant. The questions put to the plaintiff were directed to prove: 1. That being engaged as a theatrical critic on "*The Daily Telegraph*," he had, after a quarrel with Mr. Vezin, the actor, written for "*The Daily Telegraph*" a false and dishonest criticism of Mr. Vezin's acting, for the purpose of gratifying his spite against that gentleman. 2. That he had apologised to other people for libels he had published of them; and 3. That he had taken proceedings for libel against a paper called "*The Hornet*," and in the course of those proceedings had made statements on oath diametrically opposed to those he had made in the witness-box on the then proceeding trial.

The questions put to the other witnesses were, 1. Questions put to Mr. Martin, Chief Clerk at the Guildhall Police Court, directed to prove what had been sworn by the plaintiff in the course of his proceedings against "*The Hornet*," and 2, a question put to Mr. Ledger, as to whether he had anywhere heard from any one before the publication of the libel in question a statement about the plaintiff to the same effect as the libel.

As to the questions put to the plaintiff himself, the case is a little complicated from the adoption by the defendant of the very unusual course of calling the plaintiff as his own witness.

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The consequence of this was that the questions could not as was admitted, be justified as going to the plaintiff's credit, since the defendant by electing to call him as his own witness had disabled himself from impeaching his credit. The rule was moved and obtained on the ground that the evidence was admissible in mitigation of damages, but on the argument it was also contended that the evidence was admissible under the plea of justification.

The authorities on the subject consist principally of decisions at Nisi Prius, some of which are contained in Nisi Prius reports, while others are to be found only in the shape of short extracts in text-books, in which last cases the principle underlying the admission of the evidence is not always easy to discover. These decisions relate to the admissibility, 1, of evidence of reputation; 2, evidence of rumours of and suspicions to the same effect as the defamatory matter complained of, and, 3, evidence of particular facts tending to shew the character and disposition of the plaintiff. The case most often cited is that of *Leicester* v. *Walter* (1) decided in 1809, which was an action for a libel in a newspaper alleging that the plaintiff had been guilty of unnatural practices. Sir James Mansfield allowed the defendant to call witnesses to prove in mitigation of damages, that before the publication of the libel there was a general suspicion of the plaintiff's character and habits; that it was generally rumoured that such a charge had been brought against him; and that his relations and former acquaintances had on this ground ceased to visit him. The learned judge in summing up told the jury that they would have to consider in assessing the damages whether the reports which had been proved were sufficient to shew that he could receive little injury, and that in this point of view it did not matter whether the reports were well or ill founded, provided they got into many men's mouths.

Sir James Mansfield in that case expressed his own dissatisfaction with the arguments adduced in support of the admissibility of the evidence, but yielded to three cases which were cited to him; one was *Knobell* v. *Fuller* (2), where Eyre, C.J., held that the defendant may on the general issue prove in mitigation of damages such facts and circumstances as shew a ground of

(1) 2 Camp. 251. (2) Peake Add. Cas. 139.

suspicion not amounting to actual proof of the plaintiff's guilt. The second was *Eamer* v. *Merle* (1) when Lord Ellenborough, in an action for words of insolvency, permitted the defendant to prove that at the time there were rumours in circulation that the plaintiffs' acceptances were dishonoured. The third was an anonymous case, in which Le Blanc, J., was stated to have received evidence under the general issue that the plaintiff had been guilty of attempts to commit the crime of which the defendant had imputed to him.

In *Eamer* v. *Merle* (1) the evidence admitted fell under the second of the above heads, while in *Knobell* v. *Fuller* (2) and the anonymous case, the evidence was admitted on the principle that facts not amounting to a complete justification might under the plea of not guilty be proved in mitigation of damages as in some way excusing the defendant. This principle has long been exploded, as it is obvious that it was impossible in practice to draw the line between facts amounting to suspicion only and facts amounting to a justification.

In *Leicester* v. *Walter* (3) there seems to have been some confusion between evidence of general reputation and evidence of rumours and suspicions, which may account for Sir James Mansfield's doubts as to the admissibility of the evidence.

In *Kirkman* v. *Oxley* (4), the date of which I have not been able to ascertain precisely, Heath, J., in an action for slander, allowed the defendant to go into evidence of the plaintiff's bad character in mitigation of damages. Here the evidence admitted would seem to fall under the first head.

In *Williams* v. *Callender* (5), decided in 1810, Lord Ellenborough held that in libel the defendant might give in evidence somewhat of the real character of the plaintiff, and shew that it was not unblemished and entire; and in this case again the evidence appears to range itself under the first head.

In ——— v. *Moor* (6), decided in 1813, the question came before a court in banc, consisting of Lord Ellenborough, C.J., and

(1) Not reported.
(2) Peake Add. Cas. 139.
(3) 2 Camp. 251.
(4) Phil. on Ev. 189; 2 Stark. on Ev. 306, n. (k).
(5) Holt, N. P. 307.
(6) 1 M. & S. 284.

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Grose and Bayley, JJ. That was an action for words imputing to the plaintiff unnatural practices, and the declaration alleged that the plaintiff had never been suspected to have been guilty of the misconduct alleged, and claimed general damages. Grose, J., allowed the witness who proved the words to be asked on cross-examination whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices. This was done upon the authority of *Leicester* v. *Walter* (1), and on the ground that it was evidence to contradict the plaintiff's allegation that he was of good fame, and that the speaking of the words occasioned the injury to it, whereupon the plaintiff elected to be non-suited. Upon motion for a new trial the rule was refused on the ground that a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and that it was competent to shew that by evidence. In this case the evidence fell under the first head.

In *Newsam* v. *Carr* (2), decided in 1817, which was an action for malicious prosecution, Wood, B., refused to allow a witness to be asked whether he had not searched the plaintiff's house upon a former occasion, and whether he was not a person of suspicious character, but expressed an opinion that such evidence was admissible in slander in mitigation of damages.

In *Waithman* v. *Weaver* (3), decided in 1822, which was an action for a libel in attributing to the plaintiff that having sold two shawls he had repurchased them the next day from a man of suspicious character at a much lower price, Abbott, C.J., expressed a doubt whether evidence was admissible that rumours were prevalent at the time of the publication of the libel to the effect of the facts there stated, and in deference to the judge's doubt the evidence was withdrawn. The evidence here appears to fall under the second head.

In *Jones* v. *Stevens* (4), which was an action for a libel on the plaintiff in the way of his profession of an attorney, the judge, at the trial, had rejected evidence that the plaintiff was of general bad character and repute in his practice and profession of an attorney. On a rule for a new trial the evidence was held

(1) 2 Camp. 251.
(2) 2 Stark. 69.
(3) 11 Price, 257, n.
(4) 11 Price, 235.

inadmissible, on the ground that it would allow the defendant to impeach all the transactions of the plaintiff's life, and throw on him the difficulty of shewing an uniform propriety of conduct during all his existence. Looking at the reasons given by the learned judges, it would almost appear that they regarded the evidence tendered in that case as evidence of particular facts tending to shew the plaintiff's disposition, or evidence under the third of the heads given above.

Although this case was decided by a court in banc in 1822, it seems to have attracted but little attention, and does not appear to have been cited in any of the five cases next following:—

In *Ellershaw* v. *Robinson* (1), decided in 1824, an action for words imputing adultery to the plaintiff, a widow, Holroyd, J., held that it was competent to the defendant to go into general evidence to impeach the plaintiff's general character for chastity. So, in *Mawby* v. *Barber* (1), decided in 1826, Lord Tenterden, C.J., admitted general evidence of the plaintiff's bad character; and in *Moore* v. *Oastler* (1), decided in 1836, Lord Denman, C.J., did the same after consulting Parke, B. A similar course was adopted by Coltman, J., in *Hardy* v. *Alexander* (2), decided in 1837, but Cresswell, J., in *Richards* v. *Richards* (3), stated from his own recollection that in that case the evidence was received without opposition. In all of these last four cases the evidence admitted fell under the first head.

In *Richards* v. *Richards* (3), decided in 1844, which was an action of slander for imputing to the plaintiff that he had grossly ill-treated a woman, Cresswell, J., after consulting Wightman, J., allowed defendant to cross-examine plaintiff's witnesses for the purpose of shewing that the supposed misconduct of the plaintiff had been a frequent topic of conversation among those who were employed by the plaintiff in his business, and was commonly rumoured in the town in which the plaintiff resided before the conversation which was the subject of the action, for the purpose of shewing that the defendant was at all events not the inventor of the slander, and that the injury arising from the slander could not be wholly ascribed to him. In this case the evidence would seem to fall under the second head.

(1) 2 Stark. on Ev. 641, n. (e). (2) 2 Stark. on Ev. 642, n. (e).
(3) 2 Mood. & Rob. 557.

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In *Thompson* v. *Nye* (1), decided in 1850, which was an action for words imputing unnatural practices, it was held that a witness could not be asked generally whether he had heard that the plaintiff was addicted to such practices, the question being general and not confined to reports existing before the time of the slander. The other judges declined to express an opinion whether the question would have been admissible if limited to rumours in existence before the date of the alleged slander, but Coleridge, J., stated that his impression was, that evidence of rumours that the plaintiff had been guilty of the conduct imputed to him by the defamatory matter complained of was not admissible. The question in this case was very loosely put, and the evidence which was rejected hardly seems to have amounted to general evidence of reputation.

In *Bracegirdle* v. *Bailey* (2), decided in 1859, which was an action for slander imputing a forgery, Byles, J., after consulting Willes, J., held, that the plaintiff not having been examined in chief could not in mitigation of damages be cross-examined as to his past conduct and life. The evidence here rejected would seem to fall under the third head as evidence of particular facts tending to shew the disposition of the plaintiff.

In *Bell* v. *Parke* (3), decided in 1860, which was an action of slander for imputing to the plaintiff that he had attempted to steal a gold chain, the judge at the trial had rejected evidence of rumours that the plaintiff had committed the act imputed to him by the slander, which was tendered in mitigation of damages. Upon the argument of a conditional order for a new trial Pigot, C.B., was of opinion that not only could evidence of general reputation of general bad character, or of habitual vice, or habitual misconduct, be adduced, but also what he called general evidence of a general reputation of the particular crime alleged in the imputed slander to have been committed by the plaintiff; but Fitzgerald and Hughes, BB., were of opinion that the latter class of evidence was not admissible. The evidence rejected in this case seems to have fallen under the second head.

From this review of the authorities it will be seen that there is a considerable conflict of opinion, and before discussing them further it seems desirable to consider the principles underlying

(1) 16 Q. B. 175. (2) 1 F. & F. 536. (3) 11 Ir. C. L. Rep. 413.

them. Speaking generally the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held. He complains of an injury to his reputation and seeks to recover damages for that injury; and it seems most material that the jury who have to award those damages should know if the fact is so that he is a man of no reputation. "To deny this would," as is observed in Starkie on Evidence, "be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantum of injury sustained a knowledge of the party's previous character is not only material but seems to be absolutely essential."

It is said that the admission of such evidence will be a hardship upon the plaintiff, who may not be prepared to rebut it; and under the former practice, where the damages could not be pleaded to, and general evidence of bad character was allowed to be given under a plea of not guilty, there was something in this objection, which, however, is removed under the present system of pleading which requires that all material facts shall be pleaded, and a plaintiff who has notice that general evidence of bad character will be adduced against him, can have no difficulty whatever if he is a man of good character in coming prepared with friends who have known him to prove that his reputation has been good.

On principle, therefore, it would seem that general evidence of reputation should be admitted, and on turning to the authorities previously cited it will be found that it has been admitted in a great majority of those cases, and that its admission has been approved by a great majority of the judges who have expresssd an opinion on the subject.

As to the second head of evidence or evidence of rumours and suspicions to the same effect as the defamatory matter complained

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of, it would seem that on principle such evidence is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it they are not relevant to the issue. To admit evidence of rumours and suspicions is to give any one who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading through the means of the publicity attending judicial proceedings what he may have picked from the most disreputable sources, and what no man of sense, who knows the plaintiff's character, would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all that those who know him best can say is that they have not heard anything of these rumours. Moreover, it may be that it is the defendant himself who has started them.

Turning to the authorities, it will be seen that while such evidence appears to have been admitted by Lord Ellenborough, C.J., in *Eamer* v. *Merle* (1), and by Cresswell, J., with the approbation of Wightman, J., in *Richards* v. *Richards* (2), and while its admissibility was supported by Pigot, C.B., in *Bell* v. *Parke* (3), it was doubted by Abbott, C.J., in *Waithman* v. *Weaver* (4), and by Coleridge, J., in *Nye* v. *Thompson* (5), and it was held inadmissible by Fitzgerald and Hughes, BB., in *Bell* v. *Parke* (3), and by the whole Court of Exchequer, in *Jones* v. *Stevens*. (6)

In *Leicester* v. *Walter* (7), evidence of rumours and suspicions was admitted by Sir James Mansfield against his own judgment; but in that case it was proposed to prove that the plaintiff's relations and former acquaintances had ceased to visit him on account of these rumours and suspicions, so that the evidence would seem really to have amounted to evidence of general reputation.

Upon the whole, both the weight of authority and principle seem against the admission of such evidence.

As to the third head or evidence of facts and circumstances

(1) Not reported.
(2) 2 Mood. & Rob. 557.
(3) 11 Ir. C. L. Rep. 413.
(4) 11 Price, 257, n.
(5) 16 Q. B. 175.
(6) 11 Price, 235.
(7) 2 Camp. 251.

tending to shew the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation, and to admit evidence of this kind is in effect as was said in *Jones* v. *Stevens* (1) to throw upon the plaintiff the difficulty of shewing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of. Among all the cases which have been reviewed there is not one which can be cited in support of the admissibility of this evidence. In *Bracegirdle* v. *Bailey* (2) such evidence was rejected by Byles, J., after consulting with Willes, J., and in *Jones* v. *Stevens* (1) the evils attending its admission are eloquently pointed out.

To apply these principles to the case in hand. In the course of his examination in chief of the plaintiff, Mr. Willis asked him whether he had used his position as a critic of "*The Daily Telegraph*" to injure or annoy an actor? The witness answered "Never;" whereupon a discussion ensued between Mr. Russell and Mr. Willis as to the admissibility of the question. Ultimately, Mr. Willis proposed to pursue the inquiry further by asking the witness whether on the 16th of May, 1881, he reviewed in "*The Daily Telegraph*," Mr. Vezin's appearance as *Iago* at Drury Lane? The question was objected to, and Mr. Willis supported the question on the ground that it was material to the justification, as shewing that the plaintiff had abused his position as a critic for other purposes than that of extorting money, viz., for the purpose of grossly abusing a man he personally disliked.

Lord Coleridge held, as I think rightly, that the question was not admissible, as tending to prove justification; the natural meaning of the libel being that the witness abused his position as a critic for the purpose of extorting money. Mr. Willis now contends that it was also admissible as evidence tending to shew the plaintiff's general bad character. I am of opinion that it falls under the third head of evidence above discussed, viz., evidence of

(1) 11 Price, 235. (2) 1 F. & F. 536.

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particular facts tending to shew the plaintiff's disposition, and is therefore inadmissible.

Mr. Willis next asked the witness whether he had published libels himself? to which the witness answered "No, not within my knowledge." Mr. Russell objected that this was cross-examination to credit. Lord Coleridge thereupon said, "It is open to every conceivable objection," and the topic was not further pursued by Mr. Willis. Mr. Willis next asked, "Have you apologised for libels?" This question was objected to, and rejected by his Lordship. Mr. Willis who appears at the time to have acquiesced in this decision, now contends that he should have been allowed to pursue the first question and put the second; but I am clearly of opinion that both were inadmissible, on the same ground as the first question about the article in "*The Daily Telegraph.*"

In the re-examination of the plaintiff, Mr. McDonell asked him whether he took criminal proceedings in 1873, at the Guildhall, against "*The Hornet,*" and afterwards stopped the proceedings? This question was objected to, as not arising out of the cross-examination, and on Mr. McDonell's admission that it did not so arise, it was rejected. The rejection of the evidence on this ground was a matter for the discretion of the judge who presided at the trial, and that discretion appears to have been rightly exercised as the question was clearly inadmissible on the same ground as those already discussed.

Mr. McDonell then called Mr. Martin, the Chief Clerk at the Guildhall Police Court, to prove what took place at the Guildhall, in 1873, when the plaintiff took proceedings against "*The Hornet,*" with a view to shew by this among other instances what the plaintiff's character was, and that he had been in the habit of libelling persons. This evidence was objected to, and rejected, and, I think, rightly rejected, for the same reason as the former questions.

Lastly, Mr. Ledger was called on behalf of the defendant, and was asked whether he had heard anywhere the story which was the libel in question before he saw it in "*The Referee?*" This question was also objected to and rejected. The form of the question shews to my mind very forcibly the injustice of admitting evidence of rumours. The witness was asked whether he had

heard the story anywhere? but in the discussion which ensued it was stated that he had heard it in some club. The defendant was charged with having published a false and malicious libel in a magazine, and it is suggested that he ought to be allowed to call a witness to say that he had previously heard the same story from some one in a club. How can the gossip of some idler in a club be material to the issue in this case? How is it shewn that the plaintiff's reputation was in the slightest degree affected by such gossip? and how can the plaintiff meet such evidence as this? The person who repeated the story to Mr. Ledger might, if he were put into the witness-box, be compelled to admit on cross-examination, that he had himself heard the story from the defendant, or that he had told the story without the slightest ground for it, or be shewn to be a person whom no one who knew him would believe for a moment.

I hold that the evidence was rightly rejected as falling under the second head of evidence, viz., evidence of rumours and suspicions discussed above.

I have now gone through the whole of the evidence which was tendered, and, in my opinion, the whole of it was properly rejected. There is, however, still another ground on which, even assuming the evidence to have been material, it was rightly rejected. The defendant proposed to prove certain facts which he alleged were material, but these facts were not stated or referred to in the pleadings as required by Order XIX., rule 4, and it appears to me that on that ground their rejection might have been supported, had they been material, which, however I have said, I think they were not.

Rule discharged.

Solicitors for plaintiff: *Lewis & Lewis.*
Solicitors for defendant: *Watson, Sons, & Room.*

A. P. S.

1882
March 13.

NORDON *v.* DEFRIES AND OTHERS.

Practice—Discovery and inspection of Documents—Shorthand Notes of Proceedings in previous Action—Privilege.

An action having been commenced to determine whether the defendant had or had not executed a certain agreement, the defendant, while the action was pending, commenced an action against other persons, whom he charged with a conspiracy to defraud him, and to utter the agreement as binding upon him, knowing it to be a forgery. After the commencement of the second action, the defendant caused shorthand notes to be taken of the evidence, speeches, and summing-up at the trial of the first action, as he deposed, for the purpose ["amongst others"], of his case in the second action:—

Held, upon the above facts, that the shorthand notes were privileged from inspection in the second action, and that the affidavit need not shew that the notes came into existence exclusively for the purposes of such action.

MOTION by way of appeal, from an order of North, J., in Chambers, allowing the defendants (except one defendant, M. J. Nordon), inspection of certain shorthand notes specified by the plaintiff in his affidavit in answer to interrogatories.

The material paragraphs of the affidavit, were as follows:

"1. I have in the possession of my solicitor, a transcript and several prints of shorthand writer's notes of the evidence, speeches, and summing-up on the trial of the issue of fact, directed by the Master of the Rolls to be used in the action *Nordon* v. *Nordon*, 1881 (in which action I am the defendant), relating to the question of the genuineness of the alleged agreement referred to in my statement of claim.

"5. The said shorthand notes were taken, transcribed, and printed [at my sole expense] after the commencement of this action, for the purpose, amongst others, of my case in this action.

"6. I claim that the said shorthand notes are privileged from inspection in the same manner as notes taken by an advocate or a suitor are. Moreover, the said notes are not documents relating to the matters in question in this action."

It was admitted during the argument, that the issue in *Nordon* v. *Nordon*, had been directed to determine whether the plaintiff had executed the agreement referred to in the affidavit, and that, while *Nordon* v. *Nordon* was pending, the plaintiff had commenced

the present action charging the defendants with a conspiracy to defraud him, and to utter the agreement as binding upon him, knowing it to be a forgery. It was further admitted, that the issue in *Nordon* v. *Nordon* had been decided against the present plaintiff.

March 3. *H. Kisch*, for the plaintiff. The order was wrong, for the affidavit sufficiently shews that the shorthand notes were taken for the purposes of the present action, and are therefore privileged. It is not necessary that the shorthand notes should have been prepared solely for the present action, and in any case the Court will infer that they were taken with a view to future litigation. [He cited (in addition to the cases referred to in the judgment), *Nicholl* v. *Jones*. (1)]

W. English Harrison, for the defendants. The statement in the plaintiff's affidavit, that the shorthand notes were taken for the purpose "amongst others," of the plaintiff's case in this action, does not afford sufficient ground for privilege. The affidavit ought to have shewn that the notes were taken exclusively for the purposes of the present action. The statement must be taken most strongly against the deponent. [He cited *Thomas* v. *Rawlings*. (2)]

Cur. adv. vult.

March 13. The judgment of the Court (Mathew, J., and Cave, J.,) was delivered by

MATHEW, J. This was an appeal from an order made at Chambers directing the plaintiff to produce for the inspection of the defendants a print of the shorthand notes of the evidence which had been taken for the plaintiff upon the hearing of a case of *Nordon* v. *Nordon*.

In *Nordon* v. *Nordon*, an issue had been directed to determine whether the present plaintiff had or had not executed a certain agreement. While the suit of *Nordon* v. *Nordon* was pending, the plaintiff commenced the present action, charging the defendants with a conspiracy to defraud the plaintiff, and to utter the agreement as binding upon him, knowing it to be a forgery.

(1) 2 H. & M. 588. (2) 27 Beav 140.

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It appeared from the statements of counsel that the issue had been decided against the present plaintiff, and that this action was then proceeded with. Upon an application for the production of the documents in the plaintiff's possession he had resisted an inspection of the shorthand notes on the ground that they were privileged.

Exception was taken to the form of the affidavit under which the privilege was set up, and if it were not that the material facts relating to the litigation were properly admitted by counsel in the course of the argument, the objection would seem well founded that the grounds of the privilege were not stated with sufficient precision. But having regard to these admissions, we think that the case ought not to be determined upon the technical point which was raised before us and at Chambers. The affidavit states that the shorthand notes were taken for the purpose among others of the plaintiff's case in this action. It was argued that unless the affidavit shewed that documents sought to be protected came into existence exclusively for the purposes of the pending action they were not privileged. But no authority was cited in support of this contention. It is probable in this case that the notes of the evidence were taken as well with a view to ulterior proceedings in the case of *Nordon* v. *Nordon* as for the purposes of this action. If so the notes would seem to have been clearly privileged in that suit, and it is difficult to see why their being privileged in one suit should destroy the privilege in another arising out of the same subject matter. It seems unreasonable that a privilege in each should become a privilege in neither.

Assuming, then, that the privilege may exist if properly claimed, we have to see whether it is sufficiently made out in the present case. We think that it does appear that the document came into existence with a view to and in contemplation of the present action, and in order to assist the plaintiff, who is a solicitor, in its conduct and prosecution. If the plaintiff has a cause of action against the defendants, it is manifest that it would be most important for the plaintiff to be enabled to submit to his counsel a full and precise statement of the evidence given by the defendants and their witnesses at the former trial. We are there-

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fore disposed to give credit to the suggestion that the notes were intended to form materials for the guidance of the plaintiff and his counsel in the prosecution of the present action, and we think that the affidavit of the plaintiff is sufficient to enable us to act upon this view.

In accordance, therefore, with the principles laid down in *Southwark Water Co.* v. *Quick* (1), *Anderson* v. *Bank of Columbia* (2), and *McCorquodale* v. *Bell* (3), we are of opinion that the shorthand notes are protected from inspection and that the appeal must be allowed.

Order rescinded.

Solicitors for plaintiff: *A. Abrahams & Co.*
Solicitor for defendants: *Hands.*

A. P. S.

IN RE CLEW.

1881
Dec. 16.

Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 51—*Fine or Imprisonment—No Order of Distress—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 21, *subs.* 3.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21, subs. 3, does not apply to the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3, subs. 1, s. 51, subs. 2, so as to give justices jurisdiction to order imprisonment for non-payment of a penalty exceeding 5*l.*, under s. 3, without first ordering a distress.

By the Licensing Act, 1872, s. 2, an unlicensed person selling intoxicating liquors is liable to a penalty or to imprisonment:—

Held, that a conviction imposing a penalty exceeding 5*l.*, and, in default of payment, imprisonment, was bad.

RULE calling upon justices of Sussex and the governor of Lewes Gaol to shew cause why a writ of habeas corpus should not issue commanding them to bring up the body of Elizabeth Evans Clew, and why, in the event of the rule being made absolute, she should not be discharged out of custody.

From affidavits it appeared that on the 31st of October, 1881, an information laid against the prisoner under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3, for selling exciseable liquors without a license, was heard by the justices sitting as a Court of summary jurisdiction. She was represented by a solicitor who

(1) 3 Q. B. D. 315. (2) 2 Ch. D. 644.
(3) 1 C. P. D. 473.

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stated on her behalf that she was a married woman, and that no penalty imposed on her could be levied by distress, as all the goods in the hut which she occupied belonged to her husband. The superintendent of police certified to the justices that no sufficient distress could be levied upon her goods. The charge was proved and she was convicted of it. The conviction stated that it was adjudged that the defendant "do for her said offence forfeit and pay the sum of 12*l.* and 10*s.*, and do also pay 1*l.* 6*s.* 6*d.*, for costs. And it is ordered that the said sums be paid forthwith. And if default is made in payment according to this adjudication and order, it is adjudged that the defendant be imprisoned in Her Majesty's prison at Lewes, and there kept to hard labour for the space of one calendar month," unless the said sums and all costs and charges of her commitment and conveyance to the said prison be sooner paid.

No warrant of distress was issued. On the 5th of December, 1881, the penalty being unpaid, the informant applied to the justices for a warrant of commitment which was granted against the woman in pursuance of the conviction, and she was, on the 7th of December, lodged in the gaol.

Grain, shewed cause. The prisoner ought not to be discharged. She was heard and convicted under 35 & 36 Vict. c. 94, s. 3. It appeared to the Court that she had no goods, and she might have been committed forthwith. Time was however given to her, and she was long in default before she was sent to gaol.

[BOWEN, J. Had she not notice of the application to commit her?]

Notice was unnecessary: Jervis' Act, 11 & 12 Vict. c. 43, s. 19. She confessed that she had no goods whereon distress might be levied. The Summary Jurisdiction Act (42 & 43 Vict. c. 49), s. 21, subs. 3, applies.

Lockwood, in support of the rule. The conviction is bad. The punishment by fine or imprisonment under 35 & 36 Vict. c. 94, s. 3, is alternative. The justices had no power to impose a fine exceeding 5*l.*, and in default of payment to imprison without ordering distress: *In re Brown.* (1)

(1) 3 Q. B. D. 545.

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THE COURT called on

Grain, to support the conviction. The imprisonment is not an alternative punishment, but is in default of payment of the fine. Default was made. The conviction merely informed the offender of the consequence which would follow her failure to pay.

GROVE, J. I am of opinion that the conviction is bad. The question may have arisen from the justices having a printed form of conviction, which appears to be the form given in the schedule to 11 & 12 Vict. c. 43. They seem to have used this form to record the conviction of a person under s. 3 of the Licensing Act. I think s. 21 of the Summary Jurisdiction Act, 1879, does not contemplate the Licensing Acts, but many other Acts under which persons may be convicted and punished by fine, or, in default of payment of the fine, imprisonment. The words of the Licensing Act, 35 & 36 Vict. c. 94, s. 3, are clear. The offender shall be liable to a penalty or to imprisonment. The punishment is either fine or imprisonment. I think the section does not mean a fine and, in default of payment of the fine, imprisonment, for in Acts where that is intended the legislature expresses it in terms.

If we could only have recourse to s. 3, we should find no power to enforce the penalty in the present case, assuming the conviction to merely impose a fine. But a provision meeting the case is contained in s. 51, sub-s. 2 of the Licensing Act, "Where the Court of summary jurisdiction orders that a distress shall be made in default of payment of any penal sum exceeding 5*l*. . . ., the Court may order that in default of the said sum being paid as directed, the person liable to pay the same shall be imprisoned." To carry that provision into effect the Court of summary jurisdiction must order a distress to be made, and in default of the sum being paid as directed may order imprisonment. I think the section must include not only non-payment but non-realisation of the sum by distress. This section meets the difficulty caused by the absence from s. 3 of any mode of enforcing the penalty, for it may be enforced by distress, and in default of distress imprisonment. But the justices had no jurisdiction to order imprisonment before exercising the powers conferred on them in s. 51 by ordering a distress. It is unnecessary in this case to decide whether,

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if the defendant appears and says that he has no goods, the distress can be dispensed with.

LOPES, J. I think that the conviction ought to be quashed. It was under s. 3 of the Licensing Act, 1872, empowering the justices either to fine or imprison. The punishment is alternative. They have no power under that section to imprison in default of payment of a fine. But purporting to act under that section, they ordered that the defendant should pay a fine and costs, and in default of payment should be imprisoned. I think the justices have exceeded their power, and the conviction is bad. Mr. Grain called in aid sub-s. 3 of s. 21 of the Summary Jurisdiction Act, 1879, and argued that even if the justices had not power under the first Act they had under that one. I think the Summary Jurisdiction Act had no application. Sect. 21 sub-s. 3 provides that where a person is adjudged to pay any sum of money, and in default of payment a warrant of distress is authorized to be issued, and it appears to the Court that the person has no goods or insufficient goods, or that the levy of the distress will be more injurious than imprisonment, such Court may order the person, on non-payment, to be imprisoned. I think that sub-s. 3 applies solely to cases where the justices may impose punishment by fine or, in default of payment, imprisonment. I abstain from expressing any opinion whether under sub-s. 3 there must necessarily be a rehearing.

BOWEN, J. I am of the same opinion, and for the reasons given by my learned brethren, I think the conviction bad. With respect to the hearing of a defendant before committal under sub-s. 3 of s. 21, I express no opinion, but I think it well to reserve consideration as to whether a man can be rightly sent to prison until after he has at some time or other been heard on the question whether he has sufficient goods to satisfy a distress.

Rule absolute.

Solicitors for applicant: *Sole, Turner, & Knight.*
Solicitor for respondents: *Hastie.*

J. R.

[IN THE COURT OF APPEAL.]

1882
Feb. 21.

IN THE MATTER OF THE APPLICATION OF FOSTER AND ANOTHER *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway—Costs—Railway Commissioners—Successful Defendant ordered to pay unsuccessful Applicant's Costs—Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *s.* 28—*Supreme Court of Judicature Act*, 1875, *Order LV.*

The Railway Commissioners have no jurisdiction under the Regulation of Railways Act, 1873, s. 28, to order a railway company, in whose favour they have decided upon an application to them against such company, to pay costs to the unsuccessful applicant.

Judgment of the Queen's Bench Division, ante, p. 25, reversed.

THE facts of the case are fully stated in the report of the proceedings before the Queen's Bench Division (1), and it is necessary here only to give the following short summary of them.

Messrs. Foster made an application to the Railway Commissioners against the Great Western Railway Company, which purported to be under the Regulation of Railways Act, 1873, and prayed that the company might be ordered to repair and maintain a canal on the ground that they were the owners, or had the management of it. The Railway Commissioners gave judgment for the company on the ground that they were not the owners and had not the management of the canal and were not liable, and could not be ordered to repair or maintain it; but they ordered the company to pay half the applicants' costs, not on the ground of anything which happened or was done or omitted in relation to the suit or application, but solely on the ground that in the opinion of the Commissioners the company ought some time previously to the application to have given a public notice that they were not the owners and had not the management of the canal. The Queen's Bench Division dismissed an application to stay the taxation of costs or for a prohibition.

The Great Western Railway Company appealed.

R. E. Webster, Q.C. (*R. S. Wright,* with him), for the Great

(1) Ante, p. 25.

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Western Railway Company. The Railway Commissioners had no power to order the company, who were successful defendants, to pay half of the applicants' costs. By the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 3, the Court of Common Pleas at Westminster had power to entertain complaints against railway companies in respect of the management of the traffic over their lines, and the costs of the proceedings were in the discretion of the Court. By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 6, the jurisdiction of the Court of Common Pleas has been transferred in a modified form to the Railway Commissioners, and Messrs. Foster made an application to them for redress on the ground of an alleged contravention of s. 17 by the railway company. By s. 28 it is enacted that "the costs of and incidental to any proceeding before the Commissioners shall be in the discretion of the Commissioners." These words are no doubt capable of a very wide meaning, but they do not enable the Railway Commissioners to make the order appealed against. It will be useful to compare with s. 28 the words of the Supreme Court of Judicature Act, 1875, Order LV., which enacts that "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." This enactment does not enable the High Court to impose upon a successful defendant any part of the general costs of the proceedings, although it may have power to order a successful plaintiff to pay the costs of the action: *Witt* v. *Corcoran* (1); *Dicks* v. *Yates.* (2)

[COTTON, L.J. According to the practice in the Court of Chancery, relief was sometimes granted on condition that the plaintiff should pay the costs of suit.]

It is not denied on behalf of the company that the Court may take into consideration the conduct of a plaintiff previous to the action in determining whether he ought to be deprived of costs: *Harnett* v. *Vise* (3); but it is a very different question whether a successful defendant can be made to pay part of the general costs of the cause. It is true that now the costs of an action tried without a jury are in the discretion of the Court: but the practice of the Court of Chancery must be followed, and according to that

(1) 2 Ch. D. 69. (2) 18 Ch. D. 76.
(3) 5 Ex. D. 307.

practice the Court could not give costs against the successful party, but was at liberty to withhold the payment of costs to him: Daniell's Chan. Prac. vol. ii. ch. xxxi. s. 1, p. 1238 (5th ed.). In *Clarke* v. *Hart* (1), Lord Cranworth said: "I think that the general principle upon the subject of costs is, and ought to be, that which was often laid down and acted upon by Lord Cottenham, that the costs ought never to be considered as a penalty or punishment, but merely as a necessary consequence of a party having created a litigation in which he has failed." In *Tidwell* v. *Ariel* (2), it is said by Leach, V.C., at the end of his judgment: "The bill must be dismissed, but without costs. I wish I could give the plaintiff his costs; but the Court cannot do this when it dismisses the bill." In *Cooth* v. *Jackson* (3) it was said by Lord Eldon, L.C.: "With respect to the costs, if I dismiss the bill, I cannot give the plaintiff his costs. Certainly, I shall not give the defendant his costs, though I do dismiss the bill." It follows from these authorities that the High Court has no power to order a successful defendant to pay costs, and the Railway Commissioners can have no greater authority than the judges of the High Court.

Anstie, and *Bosanquet*, for Messrs. Foster. It is not unreasonable that a successful party should sometimes be called upon to pay part of the costs of the litigation: under the former practice of the Ecclesiastical Courts, defendants, although they were successful, might be compelled to pay costs: Rolle's Abridg. Prohibition, (P.) 9; Viner's Abridg. Prohibition, (P.) 6. It must be admitted that according to the report of what seems to be the same case in Brownlow, 36, a prohibition was granted to the Ecclesiastical Court: it appears, however, that according to the practice of the Spiritual Courts the plaintiff, although he failed in his suit, was allowed his costs if he had causa litigandi. It is contended for the railway company that the order of the Railway Commissioners was ultrà vires; but a party to a suit, who is successful as to the chief issue, may render himself liable to costs in respect of the other issues; in *Dufaur* v. *Sigel* (4) a successful defendant was ordered to pay part of the costs on the ground of his misconduct.

(1) 6 H. L. C. 633, at p. 667. (3) 6 Ves. 11, at p. 41.
(2) 3 Madd. 403, at p. 409. (4) 4 De G. M. & G. 520.

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It is not to be assumed that the railway company succeeded as to every issue.

[BRETT, L.J. In *Dufaur* v. *Sigel* (1) the misconduct of the defendant took place in the course of the litigation: here the supposed ground of complaint happened before the litigation arose; the Railway Commissioners made the order complained of because the company did not issue a notice which they were not bound to issue.

COTTON, L.J. In *Dufaur* v. *Sigel* (1) the misconduct of the successful defendant was, in fact, contempt of court; for he inserted irrelevant matter in the affidavits.]

In *Witt* v. *Corcoran* (2) the decision was simply that the defendant was not appealing against an order for costs. *Dicks* v. *Yates* (3) is the only case which colourably supports the argument for the railway company. However erroneous the direction of the Railway Commissioners as to costs may have been, it related to a matter within their jurisdiction, and therefore their decision cannot be overruled.

Webster, Q.C., in reply, was stopped.

BRETT, L.J. We think that the matter is clear enough, and that we need not trouble the counsel for the railway company further.

The Railway Commissioners have held an inquiry between parties; that inquiry was within their jurisdiction, and they have given judgment, except as to the question of costs, entirely in favour of the railway company, on the ground that the railway company were not in any way liable to the claim made against them by Messrs. Foster. They have also dealt with the costs of the litigation, and although they have found that the company are entitled to judgment absolutely, so far as the causes of complaint are concerned, nevertheless they have adjudged that the company shall pay half the costs of the applicants. For the company it has been argued, that the Railway Commissioners have no jurisdiction to make an order like that under any circumstances. For the applicants it has been argued, that, however erroneous the

(1) 4 De G. M. & G. 520. (2) 2 Ch. D. 69.
(3) 18 Ch. D. 76.

exercise of the jurisdiction may have been, the Commissioners have power to deal with the question of costs in such manner as they may think fit. It has been further alleged on the part of the applicants (who are in this Court the respondents), that possibly the Commissioners have directed half the costs to be paid by the company on the ground that the applicants have succeeded on some of the issues of fact which were raised at the hearing.

With regard to the latter point, it seems to me that it would be an unfair manner of attempting to support the judgment of the Commissioners, if we were to assume that they may have done something which by the very terms of their judgment they do not assume to have done. They have stated the exact grounds of their judgment, which are, that some public notice might have been given of the change of circumstances and, that although there was no legal obligation on the part of the company to give that notice, yet the company are responsible for the uncertainty as to the ownership and liability to repair which occasioned the proceedings, and, consequently, that the company ought to pay part of the applicants' costs. Therefore, I think that this case must be decided on the assumption that the Commissioners have not dealt with any issues of fact, and have not given costs in respect of the success of the applicants upon any issues, and it must be assumed that although every issue of fact has been found in favour of the company, yet, on account of some neglect on their part before the litigation began, the Commissioners considered that they had jurisdiction to give part of the costs to the applicants against the company. When it is urged that the Commissioners may have given these costs in respect of issues, I cannot help observing that the costs are not measured by any issue on which the applicants have succeeded. It is obvious that the Commissioners did not act on the ground suggested but on the ground which they have stated.

The question, therefore, is whether the Commissioners have exceeded their jurisdiction, or whether they have merely come to an erroneous decision. It is true that, however erroneous the decision may have been, yet, if they had jurisdiction to make the order complained of, we cannot interfere. I shall not shrink

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from expressing in decided language the opinion to which I have come, after hearing many cases with regard to the Commissioners; I think it a misfortune both to the Commissioners themselves and to the suitors, that no appeal is allowed in respect of the important matters brought before them. It would be advantageous if they could be assisted as to their decisions by a Court of Appeal. The argument which convinces me that the order complained of was an excess of jurisdiction is this, that before the Supreme Court of Judicature Acts, 1873, 1875, there was a Superior Court which had an absolute discretion with regard to costs within its jurisdiction, and that Court was the Court of Chancery. I cannot see that there was any limit to the discretion as to costs, which were within its jurisdiction. As that power existed in the Court of Chancery, the judges of it were obliged to consider whether they had jurisdiction to make an order compelling a defendant to pay part of the plaintiff's costs, where the defendant succeeded absolutely and shewed that the plaintiff had had no title to maintain the litigation which he had commenced; and it seems to me that they came to the conclusion, not that they would not exercise a discretion belonging to them, but that they had no jurisdiction. They gave reasons for their decisions, and the language which they used shews clearly to my mind that they considered they had no jurisdiction. The terms used by Sir John Leach and by Lord Eldon in the two cases cited, seem to me to shew that in their opinion to give costs to an unsuccessful plaintiff would have been to do that which they had no jurisdiction to do. That being the rule existing in the Court of Chancery, and the Courts of Common Law having no discretion as to costs, the Supreme Court of Judicature Acts passed, and by force of Order LV., gave to the Common Law Divisions an absolute discretion as to costs. Order LV. so far as it confers a discretion, was not wanted with regard to the Chancery Division: it adopted the power of the Court of Chancery and applied it to the Chancery and Common Law Divisions of the High Court. The discretion as to costs was given in as large terms as the power was given to the Railway Commissioners by s. 28 of the Regulation of Railways Act, 1873. This raises the question whether the former jurisdiction of the Court of Chancery has been

extended, and whether a larger jurisdiction has been given to the Divisions of the High Court including the Chancery Division, or whether, notwithstanding the words of Order LV., the meaning of the Legislature was that the Chancery and Common Law Divisions of the High Court should have the same power which the Court of Chancery had had before, namely, absolute discretion as to all costs within their jurisdiction; and the further question arises whether where a defendant has so far succeeded as to shew that the plaintiff had no right to maintain the litigation against him, nevertheless costs could be given against the defendant. Now, the judgments in *Witt* v. *Corcoran* (1) and *Dicks* v. *Yates* (2) seem to me to shew that in the opinion of the judges in the Court of Appeal, which if it is the ground of their judgments is binding upon us even although we did not agree with it, the meaning of Order LV. is that there should be an absolute discretion over all costs within the jurisdiction of the High Court, and that the jurisdiction of the High Court should be precisely what the jurisdiction of the Court of Chancery was before, and therefore that where the defendant has absolutely succeeded no order can be made against the defendant in favour of the plaintiff for any part of the costs of the litigation. That seems to me to be the foundation of the judgment in *Witt* v. *Corcoran.* (1) James, L.J., says, "The Act says that there shall be no appeal for costs where they are in the discretion of the Court, but there is no discretion as to whether a man has or has not been guilty of something alleged against him." He afterwards proceeds: "The defendant says he has been guilty of nothing, and if the Court had been of that opinion, it could not have ordered him to pay the costs, any more than it could dismiss a bill and order the defendant to pay the costs of the suit." The language of this judgment seems to me to adopt the old rule of the Court of Chancery, which was declared by Lord Eldon and Sir John Leach. In *Dicks* v. *Yates* (2) the Master of the Rolls says (p. 84), "Now, if a plaintiff has no title, are the costs of the action in the discretion of the Court, so that the Court can give the whole of them to the plaintiff? It seems to me that they are not. No one has ever heard of a defendant being ordered to

(1) 2 Ch. D. 69. (2) 18 Ch. D. 76.

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pay the costs of the plaintiff who has failed to make out any title, nor did the Vice-Chancellor intend to make any such order." By using the phrase "so that the Court can give the whole of them to the plaintiff," all that the Master of the Rolls, in my opinion, meant was that if the defendant had failed on a part of the litigation, or if he had been guilty of such misconduct as occurred in *Dufaur* v. *Sigel* (1), the defendant, although successful on the whole, would have to pay the costs to the plaintiff occasioned by the matters in respect of which he had failed or misconducted himself. The Master of the Rolls seems to me to adopt the rule of the Court of Chancery, and James, L.J., uses still stronger language (p. 85): "A plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into Court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there." These cases seem to me to shew that the true construction of Order LV. is, that it adopts the jurisdiction of the Court of Chancery as to costs with the same limitation of jurisdiction as formerly existed in that Court. The further question arises whether s. 28 of the Regulation of Railways Act, 1873, is to be construed in the same manner as Order LV.: it is substantially identical; it gives a power to a judicial tribunal and therefore is in pari materiâ; and for these reasons I think that s. 28 ought to be construed in the same manner as Order LV., and that the same rule is applicable to the Railway Commissioners as is applicable to the Chancery and Common Law Divisions of the High Court, and consequently that the order of the Railway Commissioners as to the payment of costs was not merely an erroneous decision, but was something beyond the limits of their discretion. Under the circumstances the proper mode of curing the excess of jurisdiction is to say that a prohibition must go against the taxation of these costs.

COTTON, L.J. The only question which we have now to consider is whether the Railway Commissioners had jurisdiction to make the order complained of. Messrs. Foster brought the Great Western Railway Company into Court before the Railway

(1) 4 De G. M. & G. 520.

Commissioners. The complaint was founded upon s. 6 of the Regulation of Railways Act, 1873, and Messrs. Foster alleged that the company had the control of a canal, and had not properly performed the duties imposed upon them by s. 17. The Railway Commissioners have decided that the company had not offended against the statute, and that Messrs. Foster had no ground of complaint against them; nevertheless, the Commissioners have ordered the company to pay, not the costs of particular matters introduced into the pleadings, or the costs of particular steps which, in the opinion of the Commissioners, had been improperly taken, but part of the general costs of the proceedings, that is, part of the costs incurred by the applicants in bringing the company into Court in order that the matter in dispute might be decided. Had the Railway Commissioners jurisdiction to make the order complained of? It seems strange that, although a Court decides that no ground exists for instituting a suit, nevertheless it shall have power to compel the successful party to pay the costs of improperly harassing him with litigation. I am not now alluding to the costs occasioned by improperly conducting the proceedings, as by introducing irrelevant or scandalous matter; these costs the successful party may be ordered to pay, and as to this point I may mention *Dufaur* v. *Sigel* (1), and other similar cases may also be referred to. The whole question is, what is the true construction of s. 28 of the Regulation of Railways Act, 1873? Does it give the Court of the Railway Commissioners, a court first established by that Act, power in deciding a litigation between adverse parties to make the party who has been unjustly sued pay the costs? In considering this question we must recollect what was the practice of the Superior Courts existing in 1873. The Courts of Common Law had no discretion as to costs; in them the costs followed the result, and it seems to have been the object of the Supreme Court of Judicature Act, 1875, Order LV., that this rule of practice should not apply to the new tribunal, and that costs should not follow the result, but that a discretion should be exercised as to how the costs should be paid. In 1873 one tribunal existed which exercised a discretion as to costs, namely, the Court of Chancery: but, although that Court did exercise a

(1) 4 De G. M. & G. 520.

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jurisdiction as to costs of litigation, yet it was always held, down to the time of passing the Regulation of Railways Act, 1873, that where the plaintiff entirely failed, that is, where the Court came to the conclusion that he was utterly wrong in harassing the defendant with litigation, the Court had no power of making a successful defendant pay the costs of the suit. To my mind it is immaterial that only half of the applicants' costs have been ordered to be paid by the company, because, if the Court had jurisdiction to make them pay half, of course it could have made them pay the whole. By the Regulation of Railways Acts, 1873, s. 28, a discretionary power is given to a new tribunal; but that tribunal was to exercise jurisdiction as between adverse litigants, and I think it must be held that Parliament intended to confer only such power as had been exercised by the Court of Chancery. It was urged—and I refer to the argument to shew that I have not forgotten it—that the Ecclesiastical Courts exercised the jurisdiction which the Railway Commissioners claimed to exercise by making the order appealed against. It is established that the Ecclesiastical Courts did claim to exercise a jurisdiction to make a person brought before them without cause pay the whole of the costs, although it was decided that there was nothing against him. It is at least doubtful whether it was not decided by the Courts of Common Law that this claim was an excess of jurisdiction on the part of the Ecclesiastical Courts. If it were necessary to settle the point, I should say that the Courts of Common Law did decide that it was an excess of jurisdiction, because, as it seems to me, a decision to that effect would accord with the practice existing both at Common Law and in Chancery; but if the Courts of Common Law did not so decide, the result would simply be that the Ecclesiastical Courts, having regard for the purpose for which they were constituted, namely, the correction of manners, thought it right to assume the power of ordering that the costs of the litigation should be paid by persons who, although no decree could be made against them, had by their conduct given some ground for suspicions. But even this latter view cannot properly bring us to decide that the Regulation of Railways Act, 1873, in giving to this new tribunal power as to costs intended to follow the doubtful practice of the Ecclesiastical Courts, but we ought

to hold that the legislature intended to arm the new tribunal with the discretion exercised by the Court of Chancery, subject to the limitations existing also in that Court, that a successful defendant cannot be ordered to pay costs. It is unnecessary to go through the cases referred to by Brett, L.J. In my opinion, no power was given to the Railway Commissioners to make a successful defendant pay any part of the general costs, and therefore a prohibition must go to stay further proceedings upon the taxation.

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Appeal allowed.

Solicitor for company: *R. R. Nelson.*

Solicitors for applicants: *Crowder, Anstie, & Vizard.*

J. E. H.

THE QUEEN ON THE PROSECUTION OF F. D. PALMER *v.* THE JUSTICES OF GREAT YARMOUTH.

Feb. 27.

Justice of Peace—Disqualification from Bias—Litigant in similar Cases—Waiver of Objection.

At a special sessions for appeals against a poor-rate, the chairman of the magistrates, who was himself appellant in one of the cases for hearing, took part in the decision of all the cases except his own. When his own case was called on, he left the bench and went to the body of the court and conducted the case himself. On a rule for a certiorari to bring up all the orders for the purpose of quashing them:—

Held, by Field and Bowen, JJ., that the chairman, being a litigant in a matter similar to the other matters before the Court, was disqualified from acting as a justice, and that the orders were bad.

Before the sessions were held the appellants gave notice to the clerk of the justices that objection would be made "if any justices who were rated in Yarmouth heard the appeals." At the hearing this objection, and no other, was made, and it was overruled by the justices:—

Held, that the appellants were not precluded by the form of their notice from contending, in support of the rule for a certiorari, that the chairman, even if not disqualified by reason of his being rated, was disqualified by reason of his being himself a litigant; although this latter objection was not specifically mentioned in the notice, or made before the justices.

RULE for a certiorari to bring up and quash certain orders made by the justices of Great Yarmouth.

The facts, so far as material to the points decided by the Court, were as follows:—The parish of Great Yarmouth is not comprised in any union but is a parish in itself, and was brought by

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the Union Assessment Act, 1880 (43 & 44 Vict. c. 7, s. 2), under the operation of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 45. A committee was accordingly appointed by the board of guardians, and made a valuation list for the parish for the purpose of the poor-rate. Several of the inhabitants objected to the valuation, and failing to obtain relief from the assessment committee, gave notice of appeal to the borough magistrates in special sessions, held under 6 & 7 Wm. 4, c. 96, s. 6, against the poor-rate made on the 3rd of October, 1881, being the first poor-rate after the valuation list came into force. The special sessions for hearing such appeals was held on the 22nd of November, 1881, and on the 17th of the same month the clerk to the assessment committee, Mr. F. D. Palmer, wrote to the clerk to the justices as follows:—"I beg to inform you that at the hearing of the poor-rate appeals on Tuesday next objection will be made if any justices who are rated in Yarmouth proceed to hear the appeals."

On the day on which the sessions were held there were present on the bench Mr. Aldred, the mayor, who acted as chairman, and five other magistrates, and there were in court other justices who were members of the assessment committee. All the justices on the bench were resident inhabitants and rated to the relief of the poor, and the chairman was one of the appellants against the rate. At the sitting of the court he announced that he and the magistrates present, other than those who were members of the assessment committee, would hear the appeals. No objection was then raised to their doing so. The first five cases were disposed of, and in each case a reduction was made in the valuation. The case in which the chairman was appellant was then called on, whereupon the chairman left the bench and went into the body of the court and himself conducted his appeal, and the bench reduced the assessment in that case also. Another case was disposed of, and the remainder were adjourned until the 20th of December, when the mayor again presided, the bench being constituted nearly as on the preceding occasion. At such adjourned sessions an objection was made to justices rated in Great Yarmouth hearing the appeals, but it was overruled.

The rule was obtained on the ground that the justices were disqualified by being rated in Great Yarmouth, and that they

had sat and decided upon appeals in which they themselves were interested.

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Bulwer, Q.C., and *Moulton*, shewed cause, and contended that the justices were not disqualified by being rated inhabitants of the borough. [As the Court expressed no opinion on this point the arguments are omitted.] They also contended that this was the only objection specified in the notice of the 17th of November, or relied on at the adjourned sessions on the 20th of November, and that any other objection which might have been open to the assessment committee had been waived by the conduct of their clerk. They cited *Reg.* v. *Cheltenham Commissioners* (1); *Wakefield Board of Health* v. *West Riding and Grimsby Ry. Co.* (2); and *Wildes* v. *Russell.* (3)

Forbes, Q.C. (*R. S. Wright*, with him), contended that the justices were disqualified; that the letter of the 17th of November was a general notice of objection, on the ground of the interest of the justices, and applied to the case of a magistrate being himself an appellant; that it was not necessary to repeat the objection, and that nothing had been done to waive it. He cited *Rex* v. *Justices of Essex* (4); *Reg.* v. *Recorder of Cambridge.* (5)

FIELD, J., after stating the facts of the case continued:—Under these circumstances application is made to bring up these orders on the ground that they ought to be quashed, and with great reluctance we have come to the conclusion that we have no alternative but to make the rule absolute in respect of all the orders made on the two occasions. The administration of justice ought not only to be pure in itself, and capable of being demonstrated to be so, but nothing should be done by those who are administering it to throw on it a substantial doubt. It is not enough that the conclusion arrived at was right, and that it has been arrived at on right principles, for every person having a personal interest in any litigation, or having a direct or indirect motive for desiring a particular decision to be come to, should

(1) 1 Q. B. 467.
(2) 6 B. & S. 794.
(3) Law Rep. 1 C. P. 722.
(4) 5 M. & S. 513.
(5) 8 E. & B. 637.

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abstain from putting himself in such a position as that, unconsciously to himself, a bias adverse to the due administration of justice might take possession of his mind. This principle is acted on in a case of less importance than that of the administration of justice, namely, the relation of principal and agent. Nothing is clearer than that where an agent takes a reward from the other side, or puts himself in the position of having a personal benefit out of the matter in which he is acting for his employer, it is not necessary to shew any damage resulting, nor any bias in point of fact, it is enough to shew that he has put himself in a position that is inconsistent with the fair and unbiased discharge of his duties. The reason for this is plain, for it is impossible to measure the effect, great or little, that such a bias may produce. In the case of *Harrington* v. *Victoria Graving Dock Company* (1) this was established conclusively, for the jury found that the plaintiff had entered into an agreement by which he was to receive commission for superintending, and that this was inconsistent with his duty to his employer, but that he had not acted in pursuance of any bias, and that no damage had resulted, yet the Court held that the plaintiff could not maintain an action for the commission on the ground that the consideration for the contract was corrupt.

Applying those principles to this case it is difficult not to see that the course adopted on this occasion was not only very much to be deplored, but also very much to be condemned. What was done was this: the mayor knowing, as all his brother justices must have known, that he was one of the litigants, acted in five appeals and reduced the amount of the assessment, a decision which, when his own property came to be considered, it is impossible to say would not have a considerable effect upon the minds of those justices who had to decide the appeal. They state that the reductions were their united judgment; but if they discussed the matter among themselves, and if the mayor said anything to his brethren upon it, what he said must have been that which he was going to repeat afterwards in his own case. They may have been legitimate arguments and well founded, but it is impossible not to see that there was a relation produced between the mayor and the other justices which would tend to induce in their minds a bias from which the judicial mind should be kept free. Had this been

(1) 3 Q. B. D. 549.

a matter such, for instance, as an assault, or something having no common ground with the other cases, the fact that the mayor was going to conduct such a case would have had no bearing on the decisions in the other cases. Here, however, there was a common feature in all the cases, namely, that to arrive at the rateable value in each of the six cases the same elements of value had to be considered, for these houses were all in the occupation of the owners. The value would have to be arrived at in each case by comparison with that of the other hereditaments in its neighbourhood and the character of the property itself, as the Court would have no criterion arising from the amount of rent paid to guide them.

There was another point, that of disqualification arising from these justices being rated, on which I give no opinion. It is said, however, that the objection to these justices was waived, or in other words that the conduct of the assessment committee by their clerk has been such that they must be taken to have consented to the jurisdiction. At one time I was inclined to think the letter of the 17th of November was limited to the objection to justices sitting who were rated inhabitants; but it has been pointed out that this is a personal exception, and looking to the fact that they were rated inhabitants and that they were in a worse position than if they had been merely rated inhabitants, because one of their number was a litigant himself, I am unable to come to the conclusion that the particular objection of bias was not sufficiently specified. The two objections are of the same nature and character, and we cannot, in my opinion, say that the assessment committee by their clerk have so conducted themselves as to render it unjust or inequitable for them to take the objection which they now take to the orders.

The rule therefore will be made absolute in its terms.

BOWEN, J. I am of the same opinion.

Rule absolute.

Solicitors for applicant: *Torr, Janeways, & Co., for Danby Palmer, Great Yarmouth.*

Solicitors for defendants: *Maples, Teesdale, & Co., for Wm. Holt, Great Yarmouth.*

A. M.

1882
March 11.

[CROWN CASE RESERVED.]

THE QUEEN *v.* ROWLANDS AND OTHERS.

Criminal Law—The Debtor's Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13 (3)—*Creditors, removing Property with intent to defraud—Execution, removing Property to defeat—Evidence—Indictment—Execution Creditor.*

A., B., and C. were convicted, under s. 13, sub-s. 3, of 32 & 33 Vict. c. 62, of having, with intent to defraud the creditors of A., removed the property of A. since the date of an unsatisfied judgment against A.

The evidence was, that on the next night after a judgment, which was still unsatisfied, had been obtained against A., the property of A. was removed from his house by A., B., and C., in order to defeat the creditor who had obtained the judgment, and to prevent him from levying thereon to satisfy the judgment. There was no evidence that A. had any other creditors, or that there was any intention to defeat the claims of any creditors of A. other than this particular creditor.

No petition in bankruptcy had been presented against A., nor had any proceedings been taken to have his affairs liquidated by arrangement:—

Held, by Lord Coleridge, C.J., Denman, Stephen, Mathew, and Cave, JJ., that the absence of proceedings in bankruptcy or for liquidation was not material; that the provisions in question of the above statute applied to all persons; but that the conviction must nevertheless be quashed, inasmuch as an intent to defraud creditors was charged but was not proved.

THE following case was stated for the opinion of this Court by the chairman of the Carmarthen Quarter Sessions:

"David Rowlands, John Williams, and John Williams were tried before me at the last quarter sessions holden for the county of Carmarthen on the 6th day of January, 1882, upon an indictment framed upon the 3rd sub-section of section 13 of 32 & 33 Vict. c. 62.

"It was proved that a judgment had been recovered in the county court upon the 8th of November, 1881, against David Rowlands for 18*l.* 4*s.* 8*d.*, which judgment was unsatisfied at the time of the trial. It was further proved that upon the night of the same day upon which judgment had been recovered, Rowlands, with the assistance of the two Williams', removed his goods under circumstances which justified the conclusion at which the jury arrived, that the removal was effected with the object of defeating and delaying the execution creditor from obtaining the fruits of his judgment.

"It was proved that after the removal of the goods on the 8th

of November David Rowland's house was shut up, and that the bailiff of the county court endeavoured to serve two summonses upon him, but was not able to effect service.

"It was objected by counsel for the prisoner that the words 'any person' in s. 13 must be read in connection with the words of s. 11 and s. 12, and that a person to be liable under the 13th section must be either a bankrupt or have liquidated his affairs by arrangement.

"It was further objected that there was no evidence of any intention to defraud creditors generally, and that the effect to defeat and delay a particular creditor did not satisfy the words of the 3rd subsection of section 13.

"I overruled both objections, and left the question of intention to defraud the creditors to the jury, who convicted all the prisoners.

"At the request of the counsel for the prisoners I reserved this case for the opinion of the Court for the consideration of Crown Cases Reserved.

"The question for the opinion of the Court is, whether I ought to have decided in favour of either of the above objections."

The indictment was as follows:—First count: "That heretofore and before the committing of the offence next hereinafter mentioned, to wit, on the eighth day of November, in the year of our Lord one thousand eight hundred and eighty-one, judgment was recovered against David Rowlands in the county court holden at Swansea, in the county of Glamorgan, at the suit of Phillips & Son, merchants, trading in the said town of Swansea, the county court judge sitting at Swansea and making and ordering the said judgment, having jurisdiction in that behalf, and that the said David Rowlands and John Williams, a grocer, and John Williams, a rollerman, afterwards, with intent to defraud the creditors of the said David Rowlands, and within two months of the said judgment (which said judgment was at the time of the committing of the offence herein mentioned, and still is unsatisfied) removed goods and chattels (specifying them), the property of the said David Rowlands, against the form of the statute," &c.

Second count, after setting out judgment recovered, as in the first count, alleged that the said David Rowlands, aided and abetted by John Williams, a grocer, and by John Williams, a

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rollerman, afterwards, and with intent to defraud the creditors, as in first count, removed, &c.

Third count, after setting out judgment recovered, as in the first count, alleged that David Rowlands afterwards with intent to defraud his creditors, as in first count, removed, &c.

No counsel appeared.

LORD COLERIDGE, C.J. With some reluctance we have arrived at the conclusion that this conviction must be quashed. That there has been conduct in its nature dishonest would seem clear, but in order to sustain the conviction we have to see that the conduct has been such as to bring the persons charged within the provisions of the statute upon which the charge is founded, and within the indictment as framed. It is not part of our duty to make law. Our duty is to carry out, according to law, the provisions of the statute. The indictment is framed upon sub-s. 3 of s. 13 of 32 & 33 Vict. c. 62, which enacts that "any person" shall be guilty of a misdemeanour in certain cases, one of which is "if he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him." The statute in question is "an Act for the abolition of imprisonment for debt, and for the punishment of fraudulent debtors," passed with a Bankruptcy Act, though separately from it. It is a separate and independent Act, dealing no doubt with cases in which the fraudulent debtor has become subject to the law of bankruptcy, but not with those cases alone. There is nothing substantial in the first objection taken that the prisoner has not become a bankrupt, and that his affairs are not in liquidation. The offence charged is quite independent of bankruptcy. Other sections apply only to cases of bankruptcy or liquidation: this one is not so restricted. It applies to "any person," whether bankrupt or not. Here, on the very night when his goods might have been seized, the prisoner David Rowlands in company with the other prisoners, fraudulently removes his goods in order to defraud a particular creditor. But he is charged with doing this to defraud his creditors, not to defraud a creditor. I abstain from saying whether he could have been indicted and convicted of so removing his goods with intent to defraud a

creditor under this section. It is enough to say he was not so indicted. It may be that the fact of a removal intended to have the effect, and having the effect, of delaying and defrauding a creditor might have afforded evidence for the jury of an intent to defraud creditors, but this case was not so left to or considered by the jury. Whether such an inference could be drawn might depend on circumstances. Evidence sufficient to establish an intent to defraud a particular creditor might not warrant the inference of an intention to defraud creditors. The attention of the jury was not directed to this distinction, and as the direction was thus insufficient the conviction cannot be sustained.

DENMAN, J. The section applies not only to bankrupts but to all fraudulent debtors. With regard to the second objection, defrauding a particular creditor may under some circumstances afford evidence of intention to defraud creditors generally; but that is very different from saying that it must do so. In the present case there was no evidence on which this Court can say there was a general intent proved and found by the jury to defraud creditors, and that is what is charged by the indictment. There is only evidence of defeating and delaying one creditor.

STEPHEN, J. I am of the same opinion. It is clear from the general course of the legislation that the present sub-section applies generally, and not merely to bankrupts and liquidating debtors; the first objection therefore fails. With regard to the second objection the conviction might possibly have been right, but upon the facts as stated we cannot support it. There is no evidence to shew that there was a general body of creditors, or any creditors, except one. It is not clear that the matter was properly brought before the jury.

MATHEW, J. The chairman seems to have decided as matter of law that there was an intent to defraud creditors upon evidence which shewed a defrauding of a creditor.

CAVE, J., concurred.

Conviction quashed.

C. D.

Applied. WILCOX *v.* JEFFERY. [1951] 1 All E.R. 464.

1882
March 18.

THE QUEEN *v.* CONEY AND OTHERS.

Prize-fight—Aiding and Abetting—Assault—Misdemeanour.

Two men fought with each other in a ring, formed by ropes supported by posts, in the presence of a large crowd. Amongst that crowd were the prisoners. It did not appear that the prisoners took any active part in the management of the fight, or that they said or did anything. They were tried and convicted of assault, as being principals in the second degree.

The jury were directed that prize-fights are illegal, and that all persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so, are guilty in law of an assault, and that if the persons charged were not casually passing by, but stayed at the place, they encouraged the fight by their presence, although they did not do or say anything. Upon this direction the jury found the prisoners guilty; but added, that they did so in consequence of such direction of law, as they found that the prisoners did not aid or abet:—

Held, by Denman, J., Huddleston, B., Manisty, Hawkins, Lopes, Stephen, Cave, and North, JJ.; (Lord Coleridge, C.J., Pollock, B., and Mathew, J., dissenting), that the above direction was not correct, that mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of an assault as aiding and abetting in such fight, and that the conviction could not be sustained:

Held, by Lord Coleridge, C.J., Pollock, B., and Mathew, J., that the conviction could be sustained, that the legal inference to be drawn from mere presence, as a voluntary spectator, at a prize-fight is, in the absence of other evidence to rebut such inference, that the person so present is encouraging, aiding, and abetting such fight, and consequently guilty of assault:

Held, by the whole Court, that a prize-fight is illegal, and that all persons aiding and abetting therein are guilty of assault, and that the consent of the persons actually engaged in fighting to the interchange of blows does not afford any answer to the criminal charge of assault:

Semble, that mere presence of a person, unexplained, at a prize-fight affords some evidence for the consideration of a jury of an aiding or abetting in such fight.

CASE reserved by the chairman of the quarter sessions for the county of Berks.

1. The above named prisoners, Coney, Gilliam, and Tully, together with five other persons were tried at the general quarter sessions for the said county on the 18th of October, 1881.

2. They were charged in an indictment containing counts for unlawful assaults, riot, and rout, &c., &c. All the counts except the seventh and eighth were given up by the counsel for the

prosecution, and the trial entirely proceeded upon the seventh and eighth counts, which alone are material to the case.

3. The seventh count charges all the prisoners except Burke with a common assault upon him. The eighth count charges all the prisoners except Mitchell with a common assault upon him.

4. It appeared in evidence that on the afternoon of the 16th of June, 1881, at the close of Ascot races, a witness who was proceeding along the high road towards Maidenhead, had his attention directed to some persons coming out of a plantation by the side of the road. He went into the plantation on private ground, and there saw, a few yards from the road, a ring of cord supported by four blue stakes. The prisoners Burke and Mitchell took off their coats and waistcoats, stripped, and went into the ring. Six other persons, of whom a prisoner named Symonds was one, went into the ring, three into each corner. Burke and Mitchell fought from three quarters of an hour to an hour.

Bets were offered by some of the persons in the crowd which consisted of from 100 to 150 people.

There was no evidence that the fight was for money or reward, nor that any one tried to interrupt it.

5. In cross-examination, it was elicited that it had been rumoured that two naked men were about to race.

6. Two witnesses deposed to seeing Coney and Tully in the crowd which surrounded the ring. They were not speaking, and were not seen to be betting or taking any part in the fight, or doing anything.

One of the witnesses said that the crowd was so closely packed that it would not have been possible for Coney to push his way out, when he saw him hemmed in.

One witness spoke to merely seeing Gilliam in the crowd.

7. It was contended for the prisoners, that it was not proved that this was a prize-fight, and that there was no evidence of assaults committed by them or either of them, upon Burke or Mitchell, or that they countenanced, aided, or abetted, the men who were fighting, and that the seventh and eighth counts were not supported.

8. I directed the jury that they were to determine whether or not this was a prize-fight, and I added, "There is no doubt

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that prize-fights are illegal, indeed, just as much so as that persons should go out to fight with deadly weapons, and it is not at all material which party strikes the first blow; and all persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so, are, in point of law, guilty of an assault." I also added, in the words of Littledale, J., in *Rex* v. *Murphy* (1), which I read to the jury from Russell on Crimes, 5th ed. vol. i. p. 818, "If they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything."

9. The jury found that Burke and Mitchell were guilty of an assault upon each other, and that Parker and Symonds were guilty of an assault.

They also found that Coney, Gilliam, and Tully, were guilty; but they added, that it was in consequence of my direction of law, as they found that Coney, Gilliam, and Tully were not aiding or abetting.

10. I thereupon directed a verdict of guilty to be entered against Coney, Gilliam, and Tully upon the seventh and eighth counts, and sentenced them to three weeks' imprisonment with hard labour, subject to the opinion of the Court upon the case.

The other prisoners I sentenced to six weeks' imprisonment with hard labour.

Bail was given, and the prisoners were liberated upon recognizance to surrender at the ensuing Christmas Sessions.

The question for the opinion of the Court is whether my direction to the jury was correct?

Dec. 10, 21, 1881. *H. D. Greene*, and *Hammond Chambers*, appeared for the prisoner Coney.

The prisoners Gilliam and Tully were not represented.

Poland, J. R. W. Bros, and *R. G. C. Mowbray* appeared for the prosecution.

The arguments fully appear in the judgments.

Cur. adv. vult.

March 18. CAVE, J. In this case I am of opinion that the

(1) 6 C. & P. 103.

direction to the jury was wrong, and consequently that the conviction ought not to stand.

No direction to a jury can, in my opinion, be regarded as right or wrong without reference to the evidence before the jury; for a direction which is sufficient under a certain state of facts may be misleading and wrong under another state of facts. It is important therefore first to see what the offence was with which the prisoners were charged and what was the evidence against them.

The prisoners were charged in one count with a common assault on one Burke, and in another count with a like assault on one Mitchell.

The evidence was that on the 16th of June last, at the close of Ascot races, Burke and Mitchell had engaged in a fight near the road from Ascot to Maidenhead; that a ring was formed with posts and ropes; that a large number of persons were present looking on, some of whom were undoubtedly encouraging the fight; that the men fought for some time; and that the three prisoners were seen in the crowd, but were not seen to do anything, and there was no evidence how they got there or how long they stayed there.

The chairman of quarter sessions directed the jury in the words of Russell on Crimes, vol. i. p. 818: "There is no doubt that prize-fights are illegal, indeed just as much so as that persons should go out to fight with deadly weapons, and it is not at all material which party strikes the first blow, and all persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so are, in point of law, guilty of an assault." And the chairman added, in the words of Littledale, J., in *Rex* v. *Murphy* (1): "If they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything."

By this direction I gather that the chairman laid down as matter of law, first, that the actual fighters in a prize-fight are guilty of an assault; and, secondly, that if any person is shewn to have been present in the crowd looking on at the fight, that is not merely evidence, but, if unexplained, conclusive proof that he

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was aiding and abetting the assault. That seems to be the natural meaning of the language used, and that, from the finding of the jury, appears to me to be the sense in which they understood it. They found a verdict of guilty against five of the prisoners who, I presume, were proved to have taken some active part, or to have been there for the purpose of encouraging the fight, and as to the three prisoners in question they found that they were guilty of an assault, and yet that they were not aiding and abetting, which is to my mind an inconsistent finding. Indeed on no other supposition can I understand the verdict, for the evidence against the three prisoners, and especially against Gilliam, is quite consistent with their being labourers working near or persons going quietly home from the races, who, observing a crowd, went up to see what the matter was, and finding it was a fight stayed some short time looking on.

For the defence it was first contended that inasmuch as Burke and Mitchell had agreed to fight there was no assault. I am, however, of opinion that this is not so. With regard to an action for an assault, in the case of *Boulter* v. *Clarke* (1) it was held by Parker, C.B., that it was no defence to allege that the plaintiff and defendant fought together by consent, the fighting itself being unlawful, and in *Matthew* v. *Ollerton* (2) it was held that if one license another to beat him, such license is no defence, because it is against the peace. So with regard to an indictment for an assault, Patteson, J., in *Rex* v. *Perkins* (3), speaking of a prize-fight says, if all these persons went out to see these men strike each other, and were present when they did so, they are all in point of law guilty of an assault. There is also the authority of Coleridge, J., in *Reg.* v. *Lewis* (4), who says that whenever two persons go out to strike each other, and do so, each is guilty of an assault.

Reg. v. *Orton* (5) proves nothing against this view, for the most that can be said of that case is, that this point did not arise there. *Christopherson* v. *Bare* (6) has also nothing to do with this point, all that was there decided being that a plea of leave and license

(1) Buller's Nisi Prius, p. 16.
(2) Comb. 218.
(3) 4 C. & P. 537.
(4) 1 C. & K. 419.
(5) 39 L. T. 293.
(6) 11 Q. B. 473.

was not a good defence to an action for an assault, on the ground that if that is a defence it arises under the general issue, an assault by leave and license being a contradiction in terms.

The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling do not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in *Reg.* v. *Orton.* (1)

It was next contended that the chairman was wrong in directing the jury in the words of Littledale, J., in *Rex* v. *Murphy* (2), that if the prisoners were not merely casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything.

Now it is a general rule in the case of principals in the second degree that there must be participation in the act, and that, although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavour to prevent the felony, or apprehend the felon.

In 1 Hale, Pleas of the Crown, p. 439, it is said that to make an abettor to a murder or homicide principal to the felony there are regularly two things requisite; 1st, he must be present, 2nd, he must be aiding and abetting. If, says Hale, A. and B. be fighting and C., a man of full age, comes by chance, and is a looker on only, and assists neither, he is not guilty of murder or homicide as principal in the second degree.

So again in Foster's Crown Law, p. 350, it is said that "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary, and therefore if A. happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoureth

(1) 39 L. T. 293. (2) 6 C. & P. 103.

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to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessory." "I would be here," he continues, "understood to speak of that kind of homicide, amounting in construction of law to murder, which is usually committed openly and before witnesses, for in the case of assassinations done in private, to which witnesses who are not partakers in the guilt are very rarely admitted, the circumstances I have mentioned may be made use of against A., as evidence of consent and concurrence on his part; and in that light should be left to the jury, if he be put upon his trial."

This seems to me to hit the point. Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is primâ facie not accidental it is evidence, but no more than evidence, for the jury.

In accordance with the principles here laid down, Kelly, C.B., in *Reg.* v. *Atkinson* (1), a case of persons who were indicted for a serious riot, held, that the mere presence of a person among the rioters, even though he possessed the power, and failed to exercise it, of stopping the riot, did not render him liable on such a charge, and that in order to find any of the defendants guilty, the jury must be satisfied that they had taken part in an assembly for an unlawful purpose, and had helped, or encouraged, or incited the others in the prosecution of that purpose.

In *Rex* v. *Borthwick* (2), it is laid down that from mere presence the Court cannot intend that the prisoner was aiding and abetting.

In *Rex* v. *Perkins* (3); Perkins and three others were indicted for a riot, and an assault on Coates.

It appeared that a prize-fight was fought between Perkins and Coates, and that of the other three defendants, one acted as Perkins's second, another collected money for the combatants, while the third walked round the ring and kept the people back. Mr. Justice Patteson said "It is proved that all the defendants were assisting in this breach of the peace, and there is no doubt

(1) 11 Cox, 330. (2) 1 Doug. 207.
(3) 4 C. & P. 537.

that persons who are present on such an occasion, and taking any part in the matter are equally guilty as principals."

The foreman of the jury said that they doubted whether they could find all the defendants guilty of an assault, whereupon Mr. Justice Patteson said, "If all these persons went out to see these men strike each other, and were present when they did, they are all in point of law guilty of an assault. There is no distinction between those who concur in the act, and those who fight." Whereupon the jury convicted the men of the riot, but acquitted them of the assault.

In that case there was ample evidence that the accused were guilty of the assault, and the case did not require Patteson, J., to lay down, nor do I understand him as having laid down, that a mere on-looker is ipso facto guilty of an assault. On the contrary, I understand him to say, that to be guilty, they must not only be present, but must be "taking part in the matter," as he expresses it in the one passage, or, "concurring in the act," as he expresses it in the other.

In *Reg.* v. *Young* (1), the prisoners were indicted for the murder of Mirfin, who was killed in a duel by one Eliot. In summing up, Vaughan, J., said, "There is no difficulty as to the law upon this subject. Principals in the first degree are those by whom the death wound is inflicted. Principals in the second degree, those who are present at the time it is given aiding and abetting, comforting and assisting the persons actually engaged in the contest—mere presence alone will not be sufficient to make a party an aider and abettor, but it is essential that he should by his countenance and conduct in the proceeding, being present, aid and assist the principals. If either of the prisoners sustained the principal by his advice or presence, or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not do or say anything; yet, if he was present and was assisting and encouraging when the pistol was fired, he will be guilty of the offence imputed by the indictment." In that direction I entirely concur, but I believe if a similar direction had been given in the present case the prisoners would have been acquitted.

(1) 8 C. & P. 644.

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In *Reg.* v. *Cuddy* (1) the prisoner was charged with aiding and abetting Munro in the murder of Colonel Fawcett, whom Munro had shot in a duel. Williams, J., in directing the jury in the presence of Rolfe, B., said, "when two persons go out to fight a deliberate duel, and death ensues, all persons who are present on that occasion, encouraging or promoting that death, will be guilty of abetting the principal offender."

So far the decisions are uniform. There are, however, two which may seem to favour a different view of the law.

In *Rex* v. *Bellingham* (2) Bellingham and Savage had agreed to fight, and about 1000 persons were assembled to witness it. Mr. Rogers, a police magistrate, being applied to, to prevent it, went to the place, and told them they should not fight. Skinner said they should, and a scuffle ensued between him and Mr. Rogers, which ended in a general tumult on the part of the mob, and the rescue of Skinner. Bellingham, Savage, and Skinner were indicted for a riot, and for assaulting Mr. Rogers, and were convicted. In the course of his summing-up, Burrough, J., said, "By law, whatever is done in such an assembly by one, all present are equally liable. These fights are unlawful assemblies, and every one going to them is guilty of an offence." These obiter dicta appear to me to be no justification for the ruling of the chairman in the present case. Burrough, J., could not have intended to say that all who were present for the purpose of seeing the fight, were ipso facto liable for the riot and assault upon the magistrate which arose incidentally out of his trying to prevent the fight, and, if he did not mean that, his remarks had no relation to the offence then being tried, and were merely in the nature of a caution. Moreover, taking the whole together, Burrough, J., seems to have referred to people going to prize-fights for the purpose of encouraging them, and not to mere on-lookers.

In *Rex* v. *Murphy* (3), the prisoner was indicted for the murder of one Thompson. It was proved for the prosecution that there was a fight between Michael Murphy and the deceased, who died in consequence of the blows he received, and that the prisoner acted as one of the seconds. For the defence witnesses were

(1) 1 C. & K. 210. (2) 2 C. & P. 234.
(3) 6 C. & P. 103.

called to shew, that though the prisoner was present, he did not act as second, and that he did nothing, and did not even say anything. Mr. Justice Littledale told the jury that if the prisoner was at the fight encouraging it by his presence he was guilty of manslaughter, although he took no active part in it, and, on his attention being drawn to the evidence for the defence, his Lordship said, "I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter if they encouraged it by their presence—I mean, if they remained present during the fight. I say that if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything. If the death occurred from the fight, all persons encouraging it by their presence are guilty of manslaughter."

This summing-up unfortunately appears to me capable of being understood in two different ways. It may mean either that mere presence unexplained is evidence of encouragement, and so of guilt, or that mere presence unexplained is conclusive proof of encouragement, and so of guilt. If the former is the correct meaning, I concur in the law so laid down, if the latter, I am unable to do so. It appears to me that the passage tending to convey the latter view is that which was read by the chairman in this case to the jury, and I cannot help thinking that the chairman believed himself, and meant to direct the jury, and at any rate I feel satisfied that the jury understood him to mean, that mere presence unexplained was conclusive proof of encouragement, and so of guilt; and it is on this ground I hold that this conviction ought not to stand.

MATHEW, J. The arguments of counsel made it apparent that a difference of opinion upon the meaning of the statements in this case is possible. But it seems to me that those statements are sufficiently clear; and I proceed to say what I understand to have been proved or admitted at the trial.

The fight in which the defendants Coney, Gilliam, and Tully were charged with aiding and abetting, took place in public between two men named Burke and Mitchell. The arrangements were those usually adopted at prize-fights. Measures were taken,

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which could only have been effective with the consent of those present, to secure sufficient space for the men to fight in. Spectators, in numbers from 100 to 150, grouped themselves round the ring. Some persons in the crowd offered bets upon the result; but others, among whom were the three defendants, appeared to have been content to watch the fighting, without interfering with each other or with the combatants, and without saying or doing anything. The fight lasted from three-quarters of an hour to an hour. These facts were given in evidence, but there were other matters, not made the subject of proof, which it would seem reasonable to suppose that the jurors would know, assuming them to have been possessed of neither less intelligence nor greater than is common among jurymen. They would be aware, it seems to me, that there is a class of persons to whom prize-fights are attractive, and that pugilists fight in public for the gratification of those persons, and that the chief incentive to the wretched combatants to fight on until (as happens too often) dreadful injuries have been inflicted and life endangered or sacrificed, is the presence of spectators watching with keen interest every incident of the fight. The jurors would also know that money is usually staked upon the result by the combatants and by the spectators.

The three defendants were put upon their trial with the men who fought. All were charged with a common assault. The combatants were found guilty, and no question was raised as to the propriety of their conviction.

The case made on behalf of the prosecution against the other defendants appears to have been this, that there was evidence that they were present as spectators, and for the purpose of seeing the fight, and for no other purpose, and that those who fought and those who watched the fighting were assembled in furtherance of a common object of a criminal character, and that it was not necessary to prove that the defendants did or said anything in order to prove that they were aiding and abetting.

In this state of things it becomes very important to see how the case for the prosecution was met, and upon what grounds the jury were invited to acquit the prisoners.

Two points only appear to have been raised upon the evidence.

First, that the defendants might have been present accidentally; and, secondly, that they might have witnessed the fighting reluctantly.

Various other suggestions which were made in the course of the argument to account for the presence of the defendants for some innocent or praiseworthy purpose would seem not to have been considered worthy of the consideration of the jury.

In support of the first of these points made for the defendants, evidence was obtained upon cross-examination that there had been a rumour that two naked men were about to run a race. The object of this was to suggest that the defendants had come to see the race. The jury seem to have thought that what they came to see was not a race, but the fight. If the question were for me I should have been of this opinion.

In support of the second point, it was shewn that the crowd of spectators was so closely packed that the defendant Coney (in the opinion of one witness) could not have pushed his way out of the crowd had he wished it. The jury would seem to have considered that this did not prove Coney to have been a reluctant witness of what was going on.

No evidence was offered for the defence, and no further attempt was made to explain how the defendants came to be among those who were looking on, but it was argued that it was not proved that there was a prize-fight, and that there was no evidence of assaults committed by the defendants on either combatant: or that they countenanced, aided, or abetted the men who were fighting.

In these circumstances the jury were told by the chairman, "that persons who go to a prize-fight to see the combatants strike each other, and are present when they do so are in law guilty of an assault," and he added in the words of Littledale, J., in *Rex* v. *Murphy* (1), "that if they" (meaning the persons who were present) "were not casually passing by, but stayed at the place, they encouraged the fight by their presence, although they did not do or say anything."

The question then which the jury must, in my opinion, have understood the chairman to ask, was this, viz., whether, when the

(1) 6 C. & P. 103.

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fight took place, the defendants were there for the purpose of seeing the combatants strike each other. If so, the direction was, that they ought to find the defendants guilty, although they were not shewn to have done or said anything to assist either combatant.

The finding of the jury, as I understand it, was that the defendants were present at the fight for the purpose of seeing the combatants strike each other, and that the defendants were guilty, but they added that the defendants did not otherwise by act, or word, aid, or abet either combatant.

The chairman directed a verdict of guilty to be entered upon the counts for assault, but upon the application of counsel for the defendants, he reserved for this Court the question whether his direction was right in point of law. He was not asked to reserve the question whether or not there was evidence that the defendants were present as spectators, but as I understand, whether, assuming them to be shewn to have been present as spectators, they were criminally responsible.

It was urged in the course of the argument before us, that the chairman of the Quarter Sessions must have been understood by the jury to say, that the mere presence of the defendants was of itself conclusive proof that they were aiding and abetting. But I cannot adopt this view of his direction. The chairman called the attention of the jury pointedly to the distinction between the casual presence of a passer by, and the deliberate presence of a spectator. Further, the points made before the jury on behalf of the defendants seem to me to assume that there was evidence, not merely that the defendants were present, but that they were there for the purpose of looking on.

There was another point made by the defendants' counsel, among several which had not been raised at the trial, and which seems deserving of notice. It was said, that because of the consent of the combatants to fight there could not be an assault, and that the combatants and the defendants were therefore entitled to be acquitted. It would perhaps be a sufficient answer to say that this was not the point reserved, but as the matter was argued at some length, I think it right to state my opinion upon it. The contention really meant that the agreement of the men

to fight rendered the contest lawful and innocent. There is, however, abundant authority for saying that no consent can render that innocent which is in fact dangerous. This is as true of a prize-fight, as it is of a duel. The fists of trained pugilists are dangerous weapons which they are not at liberty to use against each other. No reason was given why the decisions to this effect which have been referred to by my Brother Cave should be overruled.

The next point made in the argument for the defendants, was that upon which counsel seemed most to rely. It was contended that the presence of persons shewn to have assembled for the purpose of witnessing prize-fights did not prove that they were aiding and abetting, and only afforded evidence from which a jury might draw that inference, and it was urged that the decisions upon which the Chairman of Quarter Sessions had acted were wrong, and ought to be overruled. It was argued that even though the combatants might be criminally responsible, it did not follow that spectators were chargeable with any offence. As to the latter class it was contended that the direction to the jury should have been, that it was for them to say whether the defendants were encouraging, or assisting the combatants, and that if it were not shewn that anything had been said or done by a particular spectator, the jury would be justified in acquitting him.

If this contention were correct some subtle distinctions would have to be made in dealing with the question of the criminality of persons present at prize-fights. For instance, it would be clear that those persons who helped to keep the ring, and so to provide sufficient space for the combatants, were aiding and abetting; but those who, in conformity with the arrangements made by the ring-keepers, remained outside the ring with the same object, would not be aiding and abetting unless the jury thought fit to say so. I cannot see the grounds for this distinction.

Many illustrations given to us of the mistake into which it was suggested that Littledale and Patteson, JJ., had fallen, were due, as it seems to me, to a misapprehension of the meaning of their decisions. Those judges never intended to say that the mere fact of presence at the place where a prize-fight was going on was proof of an intention to aid and abet. What I understand their

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lordships to have laid down is, that where a person was shewn to have been present as a spectator for the purpose of watching the fight, and with no other object, he was encouraging the combatants in their criminal purpose, and was therefore aiding and abetting. To submit to a jury in such a case the question of the guilt of spectators, is to treat, what seems to me a clear matter of law, as a doubtful question of fact. It is to intimate to the jury that they will not be wrong in determining that question in favour of the accused, and the practical result would be, that spectators would, as a general rule, escape conviction and punishment. As, without spectators, I believe there would be no prize-fights, the Courts would thus have surrendered the principal means of discouraging the disgraceful exhibitions in question, which there was some reason to hope, under the pressure of the law, were gradually being discontinued.

It was said by counsel for the defendants that the legislature had not declared that it was criminal to go and see a prize-fight, and that it was not for judges to create a new offence; but the decisions upon which the chairman's direction proceeded do not appear to me to be open to this attack. The learned judges referred to have not sought to create a new offence, but have determined, as it seems to me in accordance with reason and principle, what is sufficient in law to establish a charge of countenancing and encouraging a prize-fight. Their reasoning may be stated thus: a prize-fight, which is an assault, and therefore contrary to the law, takes place in public, in order that it may be witnessed by spectators. The spectators by their presence lend themselves to the purpose of the combatants, and countenance and encourage them in a violation of the law. They therefore aid and abet.

I have no doubt in this case that the defendants were spectators, and that the jury meant to find and properly found that they were so; and I am of opinion that they are rightly convicted.

STEPHEN, J. I entirely agree with the judgment delivered by my Brother Cave. His statement of the facts of the case, and his view of the chairman's direction to the jury, relieve me from the necessity of referring to them in detail. I wish, however, to state

in a few words the principle as to the effect of consent in charges of bodily violence which I deduce from the numerous authorities referred to by him, and to add one or two observations of my own on that branch of the case relating to aiding and abetting.

The principle as to consent seems to me to be this: When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults.

I may add one authority to those which my Brother Cave has quoted on this subject. In Brooke, Abridgment (1), it is said that in 11 Hen. 7 it was held that tournaments were illegal unless by the commandment of the King, and it is added that in the time of Henry VIII. the judges held that even the King's commandment would not justify or excuse a person who killed another in a tournament, because the commandment itself was illegal. This view is adopted by Lambard (2), Hale (3), Foster (4), and East. (5) In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football, and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances.

Upon the question whether bare voluntary presence at a prize-fight is, in itself, either an aiding or abetting of the combatants,

(1) Corone, 228.
(2) Eiren. page 129.
(3) 1 P. C. 472.
(4) Foster, C. C. 259, 260.
(5) 1 East, P. C. 270.

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or conclusive evidence of it, I have only one remark to add to my Brother Cave's judgment. I think that the chairman rightly apprehended the ruling of Littledale, J., in *Rex* v. *Murphy* (1), and that that ruling was wrong. In that case it was alleged by the prosecution that Murphy acted as second in the fight. The witnesses for the defence denied this, and said that Murphy neither did nor said anything. Littledale, J., told the jury upon this, that persons who are at a fight, in consequence of which death ensues, "are all guilty of manslaughter if they encourage it by their presence; I mean if they remained present during the fight. I say that if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not do or say anything." I do not think that such cases as were suggested during the argument, cases of persons voluntarily witnessing a prize-fight for some innocent, or even laudable purpose, were present to the mind of Littledale, J., when he said this. It would be unfair to construe language, chosen on the spur of the moment, and in reference to the facts of a particular case, as it is necessary to construe an Act of Parliament; but I think the learned judge cannot have meant to say less, than that a person who looks on at a prize-fight out of mere curiosity does thereby aid and abet the fight. It would have served no purpose to say anything short of this. No one could doubt Murphy's guilt if he acted as second, or did any other positive act to encourage the fight. He was either in that position, or he was a mere spectator, and the whole point of the judge's charge is, that in either case he was guilty. In this, I think, that Littledale, J., went too far, being no doubt desirous of providing an easy and summary mode of suppressing prize-fights. It may, or may not, be desirable to make it a criminal offence to look on at a prize-fight in the absence of a lawful excuse to be proved by the spectator, but I think we should be making, instead of interpreting the law, if we were to say that such conduct is now a crime. I am very far from thinking that this is in itself a conclusive objection to this conviction. A considerable part of the law of England consists of judicial decisions, and in the very nature of things this must be so. Every decision upon a debated point adds

(1) 6 C. & P. 103.

a little to the law by making that point certain for the future. Indeed, whichever way this case may be decided, it will settle the law upon the precise point involved, and it is this which gives to judicial decisions their great importance.

It seems to me, however, that in exercising the narrowly qualified power of quasi legislation which the very nature of our position confers upon us, we ought to confine ourselves as far as possible (there may be cases where such a course is not possible) to applying well-known principles and analogies to new combinations of facts, and to supplying to general definitions, and maxims, or to general statutory expressions qualifications, which though not expressed, are, in our opinion, implied. I will illustrate my meaning as to what in my opinion the Court ought or ought not to do. I think that the judges were acting within their powers when they decided that the offence of obtaining money by false pretences could be committed only by making a false pretence as to an existing fact, though this is not expressed by the statute which creates the offence. I think on the other hand that the Court would exceed its powers, if it were to remove by judicial decisions the defects in the Common Law definition of theft which have caused so many failures of justice. To abolish a well-established rule of law because it is a bad rule is the business of the legislature.

Applying this principle to the present case, if we go further and extend the law upon considerations of general expediency, we are, I think, invading the province of the legislature. I feel fully justified in saying that the doctrine that the absence of consent is necessary to an assault requires the qualification which I have already stated, but I do not see my way to saying that the particular misdemeanour of assault differs from all others in the circumstance that a mere looker on is to be considered as a principal, unless he is able to prove some reasonable excuse for his presence. Such a rule would in my judgment be opposed to all legal analogies, and constitute an exception to all rules. The legislature can create such an exception, if it pleases, but I think that the judges ought not to introduce it, even if they think it expedient that it should be introduced, as to which I express no opinion.

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On these grounds I think that the direction to the jury was wrong. I also think that their verdict was equivalent to an acquittal, and on both grounds I think that the conviction should be set aside.

LOPES, J. I have not thought it necessary to prepare a lengthened judgment reviewing the authorities, as the cases have been fully reviewed in the judgment of my Brother Cave. I understand the ruling of the chairman to amount to this, that mere presence at a prize-fight, unexplained, is conclusive proof of aiding and abetting, even if there be no evidence that the person or persons so present encouraged, or intended to encourage the fight by his or their presence. I cannot hold, as a proposition of law, that the mere looking on is ipso facto a participation in or encouragement of a prize-fight. I think there must be more than that to justify a conviction for an assault. If, for instance, it was proved that a person went to a prize-fight, knowing it was to take place, and remained there for some time looking on, I think that would be evidence from which a jury might infer that such person encouraged, and intended to encourage, the fight by his presence. In the present case, the three prisoners were merely seen in the crowd, were not seen to do anything, and there was no evidence why or how they came there, or how long they stayed.

Applying the direction of the chairman to this state of facts, I think it was wrong.

NORTH, J., concurred in the judgment of Lopes, J.

HAWKINS, J. At the Berkshire October Quarter Sessions, 1881, the defendants were convicted under the direction of Mr. Benyon the chairman, upon two counts of an indictment. One charged them with an assault upon Charles Mitchell, the other with an assault upon John Burke; Mitchell and Burke being the combatants in a fight which took place at Ascot, on the 16th of June, 1881. The facts are fully set forth in the case reserved for the opinion of the Court of Criminal Appeal.

Two questions were argued before us. First, whether the combatants themselves were guilty of assaults upon each other? and,

secondly, whether the defendants were aiders and abettors in the fight, and therefore also rightly convicted?

Upon the first question, the defendants' counsel contended that, each of the combatants having assented to the fight, neither could be convicted of an assault upon the other. To this contention I cannot give my sanction. As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all: *Christopherson* v. *Bare* (1), *Reg.* v. *Guthrie* (2), and numerous other cases. It may be that consent can in all cases be given so as to operate as a bar to a civil action; upon the ground that no man can claim damages for an act to which he himself was an assenting party: *Christopherson* v. *Bare.* (1) That case, however, was decided upon a point of pleading, and must not be considered as a direct authority on this subject. It is not necessary, however, upon the present occasion to express any decided opinion upon the point; for, whatever may be the effect of a consent in a suit between party and party, it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution. In other words, though a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order; *per* Burrough, J., in *Rex* v. *Bellingham.* (3) He may compromise his own civil rights, but he cannot compromise the public interests.

Nothing can be clearer to my mind than that every fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage. In each case the object is the same, and in each case some amount of personal injury to one

(1) 11 Q. B. 473. (2) Law Rep. 1 C. C. R. 241, 243.
(3) 2 C. & P. 234.

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or both of the combatants is a probable consequence, and, although a prize-fight may not commence in anger, it is unquestionably calculated to rouse the angry feelings of both before its conclusion. I have no doubt then, that every such fight is illegal, and the parties to it may be prosecuted for assaults upon each other. Many authorities support this view. In *Rex* v. *Ward* (1), the prisoner was tried for the slaughter of a man whom he had killed in a fight to which he had been challenged by the deceased for a public trial of skill in boxing. No unfairness was suggested, and yet it was held that the prisoner was properly convicted. To the same effect is the case of *Reg.* v. *Lewis* (2), in which Coleridge, J., said "When two persons go out to strike each other, each is guilty of an assault." See also *Reg.* v. *Hunt* (3), *per* Alderson, B., *Reg.* v. *Brown* (4), by the same learned Baron, and by Bramwell, B., in *Reg.* v. *Young.* (5)

The cases in which it has been held that persons may lawfully engage in friendly encounters not calculated to produce real injury to or to rouse angry passions in either, do not in the least militate against the view I have expressed; for such encounters are neither breaches of the peace nor are they calculated to be productive thereof, but if, under colour of a friendly encounter, the parties enter upon it with, or in the course of it form, the intention to conquer each other by violence calculated to produce mischief, regardless whether hurt may be occasioned or not, as, for instance, if two men, pretending to engage in an amicable spar with gloves, really have for their object the intention to beat each other until one of them be exhausted and subdued by force, and so engage in a conflict likely to end in a breach of the peace, each is liable to be prosecuted for an assault: *Reg.* v. *Orton.* (6) Whether an encounter be of the character I have just referred to, or a mere friendly game, having no tendency, if fairly played, to produce any breach of the peace, is always a question for the jury in case of an indictment, or the magistrates in case of summary proceedings.

The cases cited of alleged indecent assaults on young children

(1) 1 East, P. C. 270.
(2) 1 C. & K. 419.
(3) 1 Cox, C. C. 177.
(4) 1 C. & M. 314.
(5) 10 Cox, C. C. 371.
(6) 39 L. T. 293.

by their consent, are no authorities to the contrary; and may all be disposed of in this one observation, viz., that the indecent impositions of hands charged in those cases as assaults neither involved, nor were calculated to involve, breaches of the peace, and, therefore, being by consent, were not punishable as assaults, any more than they would have been had the objects of them been for the most innocent purposes. I think it wholly immaterial, in considering cases of this description, to inquire by whom the first blow was struck, for, as was said by Lindley, J., in *Reg.* v. *Knock* (1), "the right of self-defence does not justify counter blows struck with a desire to fight."

Upon the ruling of the chairman as to the illegality of the fight, I entertain, therefore, no manner of doubt, and I am clearly of opinion that the combatants themselves were each guilty of an assault upon the other. Nor do I entertain any doubt that all who were present aiding or abetting the fight were liable to be indicted as principals to it, for by 24 & 25 Vict. c. 94, s. 8, "Whoever shall aid, abet, counsel, or procure the commission of a misdemeanour shall be tried, &c., as a principal." Whether the defendants were rightly convicted as aiders and abettors, is a different matter. I am of opinion they were not.

In summing up the case the chairman directed the jury that all persons who went to a prize-fight to see the combatants strike each other, and who were present when they did so, were, in point of law, guilty of an assault, for "if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not do or say anything." The jury, on that direction, found the defendants guilty, but they also found expressly that they were not aiding or abetting. The whole question, therefore, for us to determine, as a matter of law, is not whether voluntary presence at a prize-fight is evidence of an aiding and abetting, but whether inactive presence at a prize-fight as a voluntary spectator thereof, amounts of itself to such encouragement of it as to render a man amenable to the criminal law as an aider and abettor in that breach of the peace.

In support of the conviction Mr. Poland mainly relied upon a series of authorities in which dicta of the most eminent judges are

(1) 14 Cox, C. C. 1.

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no doubt to be found which apparently support the ruling of the chairman.

In *Rex* v. *Bellingham and others* (1), which was an indictment for riot and assaulting a magistrate who was endeavouring to stop a prize-fight, Burrough, J., before whom it was tried, is reported to have said: "By law, whatever is done in such an assembly by one, all present are equally liable for. These fights are illegal. No consent can make them legal, they are unlawful assemblies. Everyone going to them is guilty of an offence."

In *Rex* v. *Perkins and others* (2), for a riot and assault on one Coates, one of the combatants in a prize-fight, Patteson, J., after stating that prize-fights were altogether illegal, said: "If all these persons went out to see these men strike each other, and were present when they did so, they are all, in point of law, guilty of an assault, there is no distinction between those who concur in the act and those who fight."

In *Rex* v. *Hargrave* (3), a very imperfectly reported case, upon the trial of an indictment for manslaughter, the result of a fight in which one of the combatants was killed, the prisoner was charged with aiding and abetting, Patteson, J., seems to have adhered to that opinion. In *Rex* v. *Murphy* (4), upon the trial of an indictment for manslaughter (deceased having been killed in a fight in which it was alleged the prisoner acted as a second), Littledale, J., said: "If the prisoner was present at this fight, encouraging it by his presence, he is guilty, though he took no active part in it. I am of opinion that persons who are at a fight in consequence of which death ensues are all guilty of manslaughter if they encouraged it by their presence; I mean if they remained present during the fight. I say, that if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything." This last is the strongest authority in support of the proposition contended for by Mr. Poland, that mere voluntary presence as a spectator at a fight per se constitutes an aiding and abetting.

In considering the weight which ought to be attached to these dicta upon the present occasion, it should be remembered that

(1) 2 C. & P. 234.
(2) 4 C. & P. 537.
(3) 5 C. & P. 170.
(4) 6 C. & P. 103.

they were apparently uttered without argument, moreover they should be read in connection with the facts of the particular cases to which they were applied, and, as I think, rather as strong indications of the opinions of the learned judges who gave utterance to them, as to the inferences which ought to be drawn by the jury from the evidence in those cases, than as carefully considered declarations of the law as applicable to every case of this description. In each of the cases above referred to much more was alleged against the accused than that they were mere spectators, thus in *Rex* v. *Bellingham and others* (1), two of the defendants were actually fighting, whilst the third was actually endeavouring to prevent interference. In *Rex* v. *Perkins* (2), one of the defendants was a combatant, another was a second, a third kept the ring, and the fourth collected entrance money. In *Rex* v. *Hargrave* (3) the facts are very imperfectly stated, but, coupling the text with the marginal note, it would seem that the prisoner was present, and sanctioned the fight.

In *Rex* v. *Murphy* (4), no doubt the language of Littledale, J., was used with reference to a state of facts not unlike the present. I am, however, strongly inclined to think that in using it he was expressing rather his own opinion as a matter of fact, that a man who was voluntarily present at a fight encouraged it; than a proposition of law, that a wilful spectator at a fight was ipso facto an abettor of it. If, however, he intended so to rule, with all respect to that learned judge I cannot look upon that ruling as satisfactory.

In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, on non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator

(1) 2 C. & P. 234.
(2) 4 C. & P. 537.
(3) 5 C. & P. 170.
(4) 6 C. & P. 103.

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of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not. So if any number of persons arrange that a criminal offence shall take place, and it takes place accordingly, the mere presence of any of those who so arranged it would afford abundant evidence for the consideration of a jury of an aiding and abetting. A very strong authority upon this point is to be found in the case of *Rex* v. *Borthwick*. (1) That was an indictment for murder charging the prisoners as principals in the second degree. Willes, J., citing *Messenger's Case* from Kilynge's Reports, said, "Where several acts of force are found to have been actually committed in pursuance of the design" (that is a common illegal design) "there is no need to find the prisoners to have been aiding and assisting, for that is only necessary to be found where the jury find a person was there amongst them, and find no particular act of force done by him, but only in his presence. In the present case it is not found that the prisoners did any act during the affray, or that they were present aiding and assisting; and the Court cannot intend that they were." In *Reg.* v. *Young* (2), which was an indictment for murder (in a duel between Elliott and Mirfin) against the prisoners as principals in the second degree, Vaughan, J., in addressing the jury said, "mere presence alone will not be sufficient to make a party an aider and abettor; but it is essential that he should by his countenance and conduct in the proceeding, being present, aid and assist the principals." "Did the prisoners give their aid and assistance by their countenance and encouragement of the principals in this contest? It is said one of the prisoners went for the purpose of bringing about a reconciliation, not to give countenance to the continuance of the contest—that is for you."

In *Reg.* v. *Cuddy* (3), the prisoner was indicted as principal in

(1) 1 Doug. 211. (2) 8 C. & P. 644. (3) 1 C. & K. 210.

the second degree to murder (in a duel between Munro and Fawcett), Williams, J., said, "The question is whether the prisoner was at the spot at the time, and whether he took such a part as amounts in the language of this indictment to an aiding and abetting of the principal offender. All persons who were present encouraging or promoting will be guilty of abetting the principal offender," and with this direction the question was left to the jury. In *Reg.* v. *Atkinson* (1), Kelly, C.B., on the trial of the defendants for a riot, expressly ruled "that the mere presence of a person among the rioters, even though he possessed the power, and failed to exercise it, of stopping the riot, did not render him liable on such a charge." And he left the case to the jury with this direction, "that, in order to find any of the defendants guilty, the jury must be satisfied that they had taken part in an assembly for an unlawful purpose, and had helped, or encouraged, or incited the others in the prosecution of that purpose."

In *Reg.* v. *Taylor* (2) Cockburn, C.J., said, "To support an indictment against a man as an accessory by abetting an offence, there must be some sort of active proceeding on his part, he must incite, or procure, or encourage the act," and the whole Court held, that merely holding the stakes to be paid to the winner of a fight in which one of the combatants was killed was not, of itself, sufficient to make such holder an accessory to a charge of manslaughter. This case of *Reg.* v. *Taylor* (2) was a peculiar one, and it was not necessary to decide whether the facts would have justified a conviction for aiding and abetting a breach of the peace, as to which a question might possibly be raised.

It is unnecessary to multiply authorities upon this point, or to speculate upon the infinite variety of cases in which a person may innocently witness and be a passive spectator of a fight, or any other unlawful or criminal act. Nor is it necessary to express any final opinion whether or not the evidence upon the present occasion would have justified the jury, had they been so minded, in finding the defendants to be aiders and abettors. I confess I have grave doubts whether there was sufficient evidence of aiding and abetting against either. The only question we have to determine is whether, upon mere proof that the defendants were

(1) 11 Cox, C. C. 332. (2) Law Rep. 2 C. C. R. 147.

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voluntary spectators at the fight, the chairman was right in directing them to find the defendants guilty; and in recording that verdict, in the teeth of the express finding that the defendants were not aiding or abetting. I am of opinion that he was not, and I base my judgment upon this, that no matter how cogent the circumstances may be to establish active encouragement, aiding, and abetting on the part of the accused, it is the province of the jury alone to exercise their judgments upon those circumstances, and to say by their verdict whether from them they draw the conclusion of guilt or innocence: see the direction of Sir James Mansfield, C.J., in *Clifford* v. *Brundon* (1); and that however conclusive the evidence may appear to him to be, no judge has a right to direct a verdict of guilty as a matter of law, until the jury have drawn the inference essential to support such verdict.

Since this judgment was written, Baggallay, L.J., at the Warwick winter assize, 1882, in *Reg.* v. *Hodkiss and others*, who were indicted for manslaughter, stated his, which I think the correct, view of the law to be, that the mere presence of a person at a prize-fight was not in itself aiding and abetting of that which was going on. But, of course, the presence of a person at such a fight must be taken in connection with the surrounding circumstances, which might affect particular individuals and make all the difference; and in every case it was the province of the jury to determine whether those particular circumstances applied to a certain person, and so brought him within the law.

I think, therefore, this conviction ought to be quashed.

HUDDLESTON, B. I am of opinion that the direction of the learned chairman of quarter sessions was not correct, and that this conviction must be quashed.

If he had told the jury that the going to a prize-fight to see the combatants strike each other, and being present when they did so was evidence from which they might find that the defendants countenanced what was going on, and that therefore they might find them guilty, I should have been disposed to support that ruling. But that is not the effect of his summing up. By the qualification he introduced, quoting words attributed to Littledale, J.,

(1) 2 Camp. 370.

he, in substance, told the jury that staying at the place was of itself encouragement, and that the mere fact of being present was sufficient to justify a conviction. I cannot believe that the learned judge, Littledale, J., has been accurately reported in this respect, but if he has been, with great respect for so learned a judge, I cannot concur in his ruling. The mere staying at the place where a fight is going on is not necessarily encouragement; the detective sent to report what is taking place and to bring the offenders to justice cannot be said to be encouraging what is going on; a person casually passing, but who stays to see what happens and interferes to prevent, or retires in disgust, or is hemmed in so that he cannot retire, cannot be said to be encouraging. The witness mentioned in the 4th paragraph of the case could not be said to be encouraging, yet all of these were present, and stayed at the place, within the words of the learned judge. The question of what amounts to encouraging must be a question of fact in each case for the jury, and cannot be one of law. The finding of the jury was in fact one of not guilty. They bow with respect to the chairman's direction in point of law, but by adding that the prisoners were not aiding and abetting, I conclude that they intend to convey that by no act of theirs were they countenancing or encouraging the fight, a conclusion fully supported by the evidence in the case.

MANISTY, J. I am of opinion that this conviction cannot be sustained. I see no evidence that the fight was a prize-fight. In the absence of evidence to the contrary it must be taken to have been an ordinary hostile fight between two angry men, each of whom committed a series of assaults on the other; but whether it was a prize-fight, or an ordinary fight, is in my opinion immaterial, seeing that all persons who being present at a fight encourage it are guilty of an assault. In the case of a misdemeanour, all who take part in it are principals, there are no accessories in the technical sense of that term: *Reg.* v. *Greenwood.* (1)

Such being the law, the first question which arises is, whether there was any evidence to go to the jury against the three prisoners, or any of them. All that was proved was, that each of

(1) 2 Den. C. C. 453; 21 L. J. (M.C.) 127.

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them was seen in the crowd, that they were neither speaking nor doing anything, and as to Coney, that he was so hemmed in as to render it impossible for him to push his way out. I very much doubt whether there was any evidence proper to be left to the jury as against any one of the three prisoners. But assuming that there was, it remains to be considered whether the direction given to the jury was correct in point of law.

The direction was that, "if the prisoners were not casually passing by, but stayed at the place, they encouraged the fight by their presence, although they did not say or do anything." The jury understood, and, as it seems to me, rightly understood, the direction to be that if the prisoners merely stayed at the place, they as a matter of law encouraged the fight by their presence, and they found the prisoners guilty of an assault, adding that they did so in consequence of the chairman's direction of law, though they found that the prisoners were not aiding or abetting.

I am of opinion that the direction was erroneous in point of law. If there was any evidence to go to the jury, it raised a question of fact for them, namely, whether the prisoners or any of them by their presence encouraged the fight. No such question was left to the jury, consequently the conviction cannot stand.

The only authority in support of the direction that I know of is to be found in the summing-up of Littledale, J., in the case of *Rex* v. *Murphy*. (1) No doubt that learned and accurate judge is reported to have used the very expressions which the chairman in the present case adopted, and repeated to the jury. Whether the learned judge, Littledale, J., did direct the jury as he is reported to have done may, I think, well admit of doubt. If he did, I think the direction was erroneous. It is said that if the ruling of the chairman is not upheld a great impetus will be given to prize fighting. I do not share in that apprehension. It is well settled law that every person who by his presence or otherwise encourages a fight, be it a prize or an ordinary fight, is guilty of a criminal offence, that is to say, of an assault or manslaughter, as the case may be, but it is for the jury in each particular case to say as a matter of fact whether the accused did by his presence or otherwise encourage the combatants to fight.

(1) 6 C. & P. 103.

To hold the contrary would, in my opinion, be erroneous in point of law, and very injurious in its consequences.

Suppose that the fight in question had resulted in the death of one of the combatants, then, if the direction given to the jury was right, every person who was in the crowd was in point of law guilty of manslaughter, though he neither spoke nor did anything, and notwithstanding that in the opinion of the jury he neither aided nor abetted the combatants. I cannot believe such is the law of England. For these reasons I answer the question submitted to the Court in the negative. If it were necessary to do so, I should be prepared to go further and hold that the special finding of the jury amounted to a verdict of acquittal. This point is, it is true, not submitted to us by the chairman, but if the Court sees upon the face of the case stated that the conviction is wrong, it is the duty of the Court to take notice of it.

POLLOCK, B. In my judgment this conviction should stand. The question stated for the opinion of the Court properly raises that which alone is open for our determination, and the answer to it should, I think, be that the direction to the jury was correct. There was ample evidence from which the jury could find, as in effect they did, that what took place between Burke and Mitchell amounted to a prize-fight; and this being so, there is clear authority for the direction of the chairman that prize-fights are illegal: *Rex* v. *Bellingham* (1); *Rex* v. *Perkins* (2); *Rex* v. *Hargrave* (3); and see also Hale's Pleas of the Crown, ch. 39. When once this is established, the only remaining question is whether, looking at the evidence as it affected the three prisoners, Coney, Gilliam, and Tully, it was sufficient to support the direction of the chairman, and if so, whether that direction was right in law.

In dealing with the evidence as it affects the three prisoners we must look first at paragraph 4 of the case, to see what was the real character of the fight as bearing upon the conduct of those who were present though not taking any active part in it, and the inference to be drawn from such conduct. The facts here set out, the ring of cord, the four blue posts, the six persons within

(1) 2 C. & P. 234. (2) 4 C. & P. 537.
(3) 5 C. & P. 170.

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the ring besides the combatants, and the fighting by these two combatants stripped for three quarters of an hour, all point to a condition of things which would denote to those present and those looking on, even if they had not gone to see a fight, that a real fight was taking place. As to the evidence affecting the prisoners, it amounts to this: that there was a crowd surrounding the ring and that they were in it; and further, as to Coney, that the crowd was so closely packed that he was hemmed in and could not push his way out.

Before I deal with the direction of the chairman, which relates to the legal effect to be given to the presence of the prisoners in this particular case, I must notice what appears to me to be the true ground upon which the decisions of judges have been based, when they have ruled that those who remain and look on whilst a fight is going on encourage it by their presence, and are guilty of an illegal act; and also the wide distinction which exists between the case of persons standing by to witness a prize-fight, and that of persons standing by and witnessing an attack by a mob, the setting fire to a building or any other illegal act of violence such as was referred to in the course of the argument.

With reference to this part of the case we ought not, when considering what is the true character of an act, to lay aside all knowledge of human nature and all experience of the habits of mankind. These appear to me to be the basis of, and necessarily to be interwoven with and form a part of all law, whether criminal or otherwise; and, when I look at the case in this light, I see no true analogy between a crowd of persons voluntarily collected round a fight, and those who in a public street or elsewhere are present whilst an illegal act (the sight of which in itself cannot reasonably be supposed to give pleasure to any one) is going on. In the one case it is usually the bystanders collected around who create and who are responsible for the fight as a matter of interest and amusement to themselves. In the other, unless there be some overt act by gesture or word which denotes assistance or encouragement, it would be contrary to all reason to infer that the bystanders were taking any part in the illegal act. Again, when a prize-fight takes place but two can fight, and but some half dozen can assist the combatants, it is however almost of the very essence of

the thing that a large number should be present as mere spectators, who could not consistently with the object of the whole proceeding actively interfere. On the contrary, where acts of violence take place, it is to say the least more probable that those who intend to encourage them will not remain mere passive spectators, but will in some measure take an active part.

In his summing up to the jury in the present case, acting upon the principle and the ruling to which I have already referred, the chairman, after telling the jury that they were to determine whether or not this was a prize-fight, directed them with reference to the three prisoners that: "All persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so, are in point of law guilty of an assault." He added also from the summing up of Littledale, J., in *Rex* v. *Murphy* (1), "If they were not casually passing by, but stayed at the place, they encouraged by it by their presence, although they did not do or say anything."

In my view of the law, this correctly laid it down as applicable to the particular case in hand. No doubt it did not exhaust the subject, or deal with all the possible cases, or all the supposititious cases which were put during the argument before us. It was said that instances might occur of persons being present at a fight such as this, or even at this fight, who yet would not be doing an illegal act; thus a weak man might be hemmed in by the crowd and so be present against his will; the father or mother of one of the combatants might be there to dissuade him, if possible, from entering upon or continuing the contest; a very short man might be at the outer edge of the crowd and so unable either to see or to apprehend what was going on, and that these persons would not be guilty of an illegal act. This is quite true, but surely it has no bearing upon the facts proved here, nor could the chairman have alluded to such cases without travelling very wide from the facts proved, and distracting the minds of the jury from the question to be considered in the particular case. The chairman's own direction is confined to "all persons who go to a prize-fight to see the combatants." The quotation from Littledale, J., is not so accurate, because it may appear to affirm the proposition that

(1) 6 C. & P. 103.

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all persons who stay at the place encourage the fight, but even as to this it states what I think is sound law, unless it be taken to include persons staying for some cause which makes it legal, or to include those curious and exceptional instances mentioned during the argument. Few propositions of law can be applied during a summing-up, even in criminal cases, so as to be sufficient and complete in omnibus; nor need they be, since the office of a summing-up is not to propound the law exhaustively, but to explain so much of it as relates to and is called for by the particular case which the jury have to try.

It only remains to notice the verdict of the jury. They found the three prisoners guilty, but added that it was in consequence of the direction of law by the chairman, as they found that these prisoners were not aiding and abetting. This should be construed in such a manner as to make it reasonable and consistent, and it can be so construed. The jury by their verdict find that the three prisoners by their presence at the fight brought themselves within the chairman's definition of the offence with which they were charged, and thereby they must be taken to have disposed of the point raised in Coney's favour, viz., that he was hemmed in by the crowd. No doubt he was, ultimately, but the jury may well have thought that he placed himself where he was, voluntarily, and in order to secure a good position whence he could see the fight. Besides those fighting there were several backers within the ring, and, as I accept the finding, I understand the jury to mean no more than that these prisoners were taking no active part in the fight.

For these reasons it seems to me, agreeing as I do with the main propositions of law that have been stated by my learned brothers and commented upon, that this conviction ought to stand.

DENMAN, J. The three defendants Coney, Gilliam, and Tully, were indicted for an assault. I think there was evidence upon which the jury might properly find that the two men, Burke and Mitchell, were engaged in an unlawful fight, and that they and their seconds were guilty of one or more assaults. But as regards the defendants Coney, Gilliam, and Tully, I find no facts stated shewing that they did anything to promote the unlawful

fight, or the assaults committed; unless the mere fact of being found in the crowd surrounding the combatants is evidence of that kind. The utmost that can be gathered from the facts stated is, that they were for some appreciable time inactive spectators of an unlawful fight.

The only question for us is, whether the direction of the chairman was correct. According to my view of that direction it amounted to telling the jury, as matter of law, that merely being found present in the crowd surrounding the combatants, was not only evidence, but conclusive evidence, that the defendants were encouraging the combatants, and therefore guilty of the assaults committed by them. If I had been on the jury I should so have understood the direction, and I think it is evident from the finding of the jury that they did so understand it.

For the reasons given by my Brother Hawkins in his judgment I entirely concur on both the points argued. I think this direction was wrong, and I therefore am of opinion that the conviction should be quashed.

LORD COLERIDGE, C.J. The facts are clearly stated in the case submitted to us by the chairman of the Berkshire Quarter Sessions, and the question is whether his direction, which he sets out in words, can in point of law be sustained. That is the question which in form the chairman has submitted to the judges, and that is the only question which I propose to answer or to discuss.

Two points were made in reference to the chairman's direction. As to the first, I conceive it to be established, beyond power of any argument however ingenious to raise a doubt, that as the combatants in a duel cannot give consent to one another to take away life, so neither can the combatants in a prize-fight give consent to one another to commit that which the law has repeatedly held to be a breach of the peace. An individual cannot by such consent destroy the right of the Crown to protect the public and keep the peace. To the judgments of Hawkins and and Cave, JJ., which I had the advantage of reading, upon this point, both in their reasonings and their conclusions, I give my entire assent.

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The judgments of Mathew, J., and Pollock, B., do not, I think, leave anything untouched on the second point, to which I now proceed. I agree with them entirely, and it is only because of the practical importance of the question that I do more than simply express my concurrence.

I proceed, then, to the second question which remains, whether persons other than the combatants who are voluntarily present at a prize-fight, and who are there as spectators of the fight, are also in point of law guilty of an assault. I mean by the words "as spectators" persons who are present for the purpose only of seeing the fight, and I have stated the question thus because I believe that to be the question intended to be raised, and I think it is the question which is raised in the case before us.

It is not dealing fairly with the chairman or with the jury, or even with ourselves, to suppose that a variety of questions so absurd that they are answered by mere statement were intended to be put to us, when there is a real and important question put which is well worthy of consideration, and as to which, no doubt, there is room for conflicting opinion. I do not trouble myself therefore with the question whether the words used would cover the case of a policeman present and doing his best to prevent the fight, of a man, policeman or not, present only to procure evidence of a breach of the peace which he is powerless to prevent, of a passer by on foot or in a carriage, who stays long enough to ascertain the character of the fight and goes upon his way, of some one on the outskirts of a crowd, curious as to the object of it, whose shortness of stature is not aided by any friendly tree. If ever these curious questions, or questions like them, should arise, it may be safely left to juries or to judges to solve them sensibly. The question I am answering is this, when there is evidence uncontradicted that a man is a spectator of a prize-fight, a spectator only if you will, but a spectator in the sense I have defined, a person who goes to see or stays to see a fight with no object but to see it, does that evidence warrant a judge in directing a jury that such evidence, if they believe it, proves that such a person is guilty as a principal in the misdemeanour? I am of opinion that such evidence does warrant a judge in giving such a direction, and that it is for the prisoner to shew, if he can,

that the legal inference from such evidence ought not to be drawn in his case.

It is not denied that there are dicta, nay, decisions, of single judges which entirely support the direction of the chairman. Indeed his charge, as he repeats it to us, is made up of the words of Patteson, J., in *Rex* v. *Perkins* (1) and Littledale, J., in *Rex* v. *Murphy*. (2) But it is said, and it is true, that these dicta, or decisions, are of single judges only, and that in none of the cases were the facts exactly the same as the facts in the case before us.

To the first objection I reply that the criminal law is built up of the dicta of single judges, and that I feel no inclination to examine critically and overrule a set of decisions which seem to me founded in good sense, and conducive to the public good. Practical wisdom, rather than scientific exactness, seems to me to be the thing to aim at in a branch of the law which is concerned with the affairs of men generally speaking in their simplest and least complicated forms. In such a case as this the spectators really make the fight; without them, and in the absence of any one to look on and encourage, no two men, having no cause of personal quarrel, would meet together in solitude to knock one another about for an hour or two. The brutalizing effects of prize-fights are chiefly due to the crowd who resort to them, and if I find judges of great reputation saying in various phrases, and on various occasions, what Littledale, J., and Patteson, J., said in the cases I have mentioned, and that in consequence, the voluntary spectators of a prize-fight have been convicted of an assault, I will, if I can, affirm such a conviction, and uphold the authority of the judges on whose decisions it is based.

I reply to the second objection that it hardly ever happens that the circumstances of two cases are exactly the same, but the words of the judges are general, and will include the case before us, and that I see no distinction in principle between the persons to whom the judges applied their doctrine and the persons to whom it is sought to apply the doctrine here. If a surgeon who attends a duel, to save if possible the lives therein imperilled, attends it as a criminal, I can see no sort of reason why the spectator of a prize-

(1) 4 C. & P. 537. (2) 6 C. & P. 103.

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fight should not, if there be fair authority for the position, be held as guilty as the prize-fighters themselves.

It must be remembered that in all these cases of constructive assaults and constructive felonies we get beyond the region of actual fact into that of positive legal inference. A second in a duel perhaps does no physical act at all; a man who stands outside a house while his fellow burglar goes inside and is guilty of violence does not, in actual fact, break and enter, yet such persons are wrongly or rightly held as guilty as the actual duellist or the actual burglar. The man who keeps the ropes, or goes round to collect contributions, no more really assaults any one than a mere spectator, but some of my learned Brothers at any rate would hold that such men are properly to be held guilty of assault. Once granted that an actual physical participation in the assault is not necessary, it seems to me that there is no legal principle in distinguishing between one set of spectators and another—using the word spectator in the sense which I have above defined—and I protest with all possible respect against drawing a line which the authorities hitherto have not drawn, which I have given my reasons for thinking there is no legal principle in drawing, and which it will, I think, be very mischievous in practice to draw.

I am of opinion that the three prisoners here must be taken on this evidence to have been spectators of a prize-fight in the above mentioned sense; that the authorities shew that such spectators are guilty of assault, and that therefore the direction of the chairman was correct, and the conviction should be affirmed. It is true that the jury have expressed their opinion that they did not aid or abet, but then, as they found the prisoners guilty, they must be taken to have meant that the prisoners did not do any outward act of aiding or abetting, which, for the reasons I have already given, appears to me immaterial.

Conviction quashed.

Solicitors for prisoners: *Rawson & Awdry, Great Marlow.*
Solicitor for prosecution: *The Solicitor to the Treaury.*

[CROWN CASE RESERVED.]

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March 25.

THE QUEEN *v.* MORBY.

Manslaughter—Neglect of Parent to provide medical Aid for Child—Evidence— 31 & 32 *Vict. c.* 122, *s.* 37.

M. was convicted of the manslaughter of his son, a child of tender years. The child died of confluent small-pox, and the prisoner, though able to do so, did not, owing to certain religious views he held, employ any medical practitioner, nor afford to the child during its illness any medical aid or attendance. It was proved that proper medical aid and attendance might have saved or prolonged the child's life, and would have increased its chance of recovery, but that it might have been of no avail; and there was no positive evidence that the death was caused or accelerated by the neglect to provide medical aid or attendance:—

Held, by Lord Coleridge, C.J., Grove, Stephen, Mathew, and Cave, JJ., that under the above circumstances the conviction could not be sustained.

The following case was stated for the opinion of this Court by Hawkins, J.

The prisoner was convicted before me at the last Session of the Central Criminal Court of the manslaughter of his son, Abraham Morby, a child under the age of 14, who lived with him and was in his custody at Woolwich.

The prisoner had ample means and opportunity to provide adequate food, clothing, medical aid, and lodging for his child, and he did provide all these things, except medical aid, this he under the circumstances hereinafter stated wilfully neglected and omitted to provide, because being one of the "Peculiar People," he did not believe in medical aid, but trusted in prayer and anointment alone.

The deceased child, who was eight years old, was on the 27th of December last known by the prisoner to be suffering from confluent small-pox. Of that disease it died on the 8th of January. The jury found that it was reasonable and proper that the prisoner should have called in and provided medical aid for it, but that he wilfully neglected and omitted so to do.

No medical man saw the deceased during life, but Doctor Sharpe who made a post-mortem examination of the body stated that death was undoubtedly due to small-pox—that small-pox is a

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disease requiring medical advice, and skill, great attention and great care, and if not attended to is calculated to spread.

This question was put to Doctor Sharpe. "In your opinion do you think the life of the deceased might have been probably prolonged if medical skill had been called in?" to which he answered thus: "Probably, but I would rather put it in this way, that the chances of the boy's life would have been increased by having medical advice."

The prisoner's counsel admitted that he could not contend that the prisoner was not guilty of a breach of the statutory duty imposed on him by 31 & 32 Vict. c. 122, s. 37, but he submitted that the death was not caused by that breach of duty. I held that if death was accelerated thereby it would be sufficient. Upon this the prisoner's counsel urged that there was no proof that death was so accelerated. Thereupon Doctor Sharpe was recalled, and the following questions were put to him to which he gave the answers subjoined:—

"In your judgment if medical advice and assistance had been called in at any stage of this disease might the death have been averted altogether?"

"I can only answer that by saying that it might have been. Ours is not a positive science. It might have been averted if medical aid had been called in at any earlier stage. I am unable to say whether it probably would. I might say probably, as to whether life might have been prolonged. I cannot say that death would probably have been averted. I think it probable that life might have been prolonged. I can only say probably might, because I did not see the case while living. I am unable to say that life would probably have been prolonged, because I did not see the case during life, had I done so, I might have been able to answer the question."

The prisoner's counsel still insisted there was no proof that death was caused or accelerated by the prisoner's breach of duty.

I thought it best to submit the evidence to the jury and to reserve the point if necessary.

I accordingly asked the jury whether the life of the child would in their judgment have been prolonged if medical aid had been

called in when the prisoner became aware of the fact that deceased was suffering from small-pox.

To this question they answered that it would.

I then told them that if they so found, and that the death of the child, though it could not be certainly averted altogether, was, nevertheless, accelerated by the wilful neglect of the prisoner to provide such medical aid when it was reasonable and proper and his duty to provide it, he having the means and opportunity to do so, he was guilty of manslaughter.

On this direction the jury found him guilty.

I reserve for the opinion of the Court of Criminal Appeal these two questions:—

1st. Whether there was any evidence that the life of the child would have been prolonged for any period of time, however short, if the prisoner had called in and provided medical aid, or, in other words, that death was accelerated by his breach of duty.

If there was, I am satisfied with the finding of the jury.

2ndly. Whether, assuming the prisoner to have accelerated the death of the child by his breach of duty in wilfully neglecting to provide for it medical aid as aforesaid, he was properly convicted of manslaughter.

If either of these questions are answered in the negative the conviction is to be quashed.

If both are answered in the affirmative it is to be affirmed.

The case not being one demanding punishment, I have released the prisoner on his own recognizances to appear for judgment if he should be required so to do.

See 31 & 32 Vict. c. 122, s. 37: *Reg.* v. *Downes.* (1)

D. Kingsford, for the prisoner. Since the passing of the statute 31 & 32 Vict. c. 122, s. 37, and the decision of *Reg.* v. *Downes* (1), it cannot be contended that there is not a positive legal duty in a parent, who can afford to do so, to supply to his child, when so ill as to require it, skilled medical attendance, and for a breach of this duty the prisoner might have been summarily convicted. That, however, is not the present charge. The charge is of

(1) 1 Q. B. D. 25.

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causing or accelerating the child's death by such breach of duty. The evidence given does not support this charge, it merely shews that medical aid might have postponed or averted death, or might not. There is no positive evidence that it would have been of any service. [He referred to *Stockdale's Case.* (1)]

THE COURT then called upon *Poland,* (*Mead,* with him), for the prosecution. He contended that the evidence shewed that life might possibly have been prolonged or saved by medical attendance, and that it was for the jury to say whether, in fact, it would have been.

LORD COLERIDGE, C.J. It is not enough to shew neglect of reasonable means for preserving or prolonging the child's life, but to convict of manslaughter it must be shewn that the neglect had the effect of shortening life. The medical witness called for the prosecution gave his evidence clearly and well, and under a high sense of his duty and responsibility, and what he stated was, that in his opinion the chances of life would have been increased by having medical advice, that life might possibly have been prolonged thereby, or, indeed, might probably have been, but that he could not say that it would, or indeed that it would probably, have been prolonged thereby.

In order to sustain the conviction affirmative proof is required. This the skilled witness called, and upon whose evidence the matter rests, cannot, from the nature of the case, give and, indeed, properly declines to give. The direction of the learned judge, though right in point of law, is not applicable to the facts proved. The conviction cannot be sustained.

GROVE, J. The judge seems to have considered that proof of the mere possibility of medical aid being of use in cases such as the one in question was not enough, that "might," in fact, was not enough, and leaves the matter to the jury, asking them to answer the question which the skilled witness said he could not. This they do, but there really was no satisfactory evidence for them, and the conviction ought not to stand.

(1) 2 Lew. C. C. 220.

STEPHEN, J. I am of the same opinion. Under s. 37 of 31 & 32 Vict. c. 122, it may be the prisoner could have been convicted of neglect of duty as a parent, but to convict of manslaughter you must shew that he caused death or accelerated it.

MATHEW and CAVE, JJ., concurred.

Conviction quashed.

Solicitor for prosecution: *The Solicitor to the Treasury.*
Solicitor for prisoner: *E. Kimber.*

C. D.

MORGAN *v.* THOMAS.

April 1.

Will—"Issue and their Heirs"—Gift over on Death without leaving Children—Estate Tail—Remainder in Fee.

The owner of land devised it to his eldest son L. "for life, and after his decease to his lawful issue and their heirs for ever, if any," and "if he should die without leaving any children born in wedlock," then to the testator's son E. and his heirs:—

Held, that the devise gave a life estate only to L. and not an estate tail.

Affirmed on appeal 9 Q.B.D. 643 C.A.

ACTION for the recovery of a farmhouse and land. Statement of claim stated the following facts.

Lewis Thomas the former owner of the premises, since deceased, made his will on the 30th of October, 1834, so far as material in the following terms: "I give, devise and bequeath to my eldest son Lewis Thomas all my freehold property whatsoever and wheresoever situate, during his natural life, and after his decease to his lawful issue and their heirs for ever, if any; if he shall die without leaving any children born in wedlock I give the said freehold property to my son Evan and his heirs for ever." The testator died in November, 1834, seised of the premises, leaving Lewis and Evan, his sons, surviving, and Lewis thereupon took possession of the premises.

Lewis Thomas, the eldest son, died in January, 1881, without having been married. Evan died in October, 1857, intestate, and the plaintiff was his heir-at-law.

On the death of Lewis the defendant took possession of the premises in question.

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The statement of defence alleged that Lewis by the will took an estate tail in the premises, that he had executed a disentailing assurance whereby the premises were conveyed to his own use, and devised the premises to the defendant.

Demurrer to the statement of defence.

Dec. 20, 1881. *Anstie*, in support of the demurrer. He cited: *Kavanagh* v. *Morland* (1); *Cook* v. *Cook* (2); *Doe* v. *Collis* (3); *Woodhouse* v. *Herrick* (4); *Bryden* v. *Willett* (5); *Heasman* v. *Pearse* (6); *Carter* v. *Bentall* (7); *Farrant* v. *Nichols* (8); *Ryan* v. *Cowley*. (9)

Upjohn (*W. Wills*, with him), in support of the statement of defence. He cited: *Slater* v. *Dangerfield* (10); *Goodright* v. *Pullyn* (11); *Roddy* v. *Fitzgerald* (12); *Warman* v. *Seaman* (13); *Wright* v. *Pearson* (14); *King* v. *Burchell* (15); *Denn* v. *Puckey* (16); *Frank* v. *Stovin* (17); *Roe* v. *Grew* (18); *Elton* v. *Eason* (19); *Doe* v. *Webber* (20); *Raggett* v. *Batty* (21); *Bacon* v. *Cosby* (22); *Parker* v. *Birks* (23); *Treharne* v. *Layton* (24); *White* v. *Hight* (25); *Perrin* v. *Blake* (26); *Montgomery* v. *Montgomery*. (27)

Cur. adv. vult.

April 1st. CAVE, J. In this case the testator made a will in these words; "I give devise and bequeath to my eldest son Lewis all my freehold property whatsoever and wheresoever situate, during his natural life, and after his decease to his lawful issue and their heirs for ever if any; if he should die without

(1) Kay, 16. 18 Jan 155.
(2) 2 Vern. 545.
(3) 4 T. R. 294.
(4) 1 K. & J. 352.
(5) Law Rep. 7 Eq. 472.
(6) Law Rep. 7 Ch. 275.
(7) 2 Beav. 551.
(8) 9 Beav. 327.
(9) Ll. & G. (Ir. Ch. Ca. temp. Sugden), 7.
(10) 15 M. & W. 263.
(11) 2 Str. 729.
(12) 6 H. L. C. 823.
(13) Finch, 282.
(14) Ambl. 358.
(15) Ambl. 379.
(16) 5 T. R. 299.
(17) 3 East, 548.
(18) 2 Wils. 322.
(19) 19 Ves. 73.
(20) 1 B. & A. 713.
(21) 5 Bing. 243.
(22) 4 D. G. & S. 261.
(23) 1 K. & J. 166.
(24) Law Rep. 10 Q. B. 459.
(25) 12 Ch. D. 751.
(26) 4 Burr. 2579; 1 W. Bl. 672.
(27) 3 Jones & Lat. 47.

leaving any children born in wedlock, I give the said freehold property to my son Evan and his heirs for ever."

The question in dispute is whether the eldest son Lewis took an estate for life or an estate tail. The devise to him during his natural life undoubtedly would give him an estate for life only, and if that devise had been followed simply by the words "and after his decease to his lawful issue," that would have given him an estate tail. It is, however, contended that the superadded words of limitation "and their heirs for ever, if any," make the words "his lawful issue" words of purchase and not of limitation, and that that construction is not affected by the language of the gift over to Evan.

Against this contention Mr. Upjohn relied on the case of *King* v. *Burchell* (1), in which it was held that a devise to A. for his life, and after the determination of that estate to the issue male of his body and their heirs, and for want of such issue over, gave A. an estate tail; and he also cited the similar cases of *Denn* v. *Puckey* (2), and *Frank* v. *Stovin.* (3)

The subject is discussed in the very important case of *Montgomery* v. *Montgomery* (4), in which Lord St. Leonards lays it down as clearly settled that a devise to A. for life with remainder to his issue with superadded words of limitation in a manner inconsistent with a descent from A., will give to the word "issue" the operation of a word of purchase. The cases, he says, are more difficult to manage when there is a devise over for want of issue. To *King* v. *Burchell* (1), he says, he never could reconcile his mind. *Denn* v. *Puckey* (2), and *Frank* v. *Stovin* (3), are not dealt with specifically in that judgment, but they seem to have proceeded on the ground that the gift over in default of issue male was only consistent with an estate in tail male in A. and consequently inconsistent with the issue male of A. taking an estate in fee. Lord St. Leonards adds that where there are superadded words of limitation, and the issue can take the fee and there is only a limitation over in a contingent event, the issue will take as purchasers according to *Lees* v. *Mosley* (5),

(1) Ambl. 379.
(2) 5 T. R. 299.
(3) 3 East, 548.
(4) 3 Jones & Lat. 47.
(5) 1 Y. & C. 589.

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following previous authorities. The present case seems exactly to meet this description. There are superadded words of limitation, and the issue can take the fee, and there is only a limitation over in a contingent event, for I am clearly of opinion that the limitation over to Evan can only take effect in the event of the eldest son Lewis dying without having had children.

This view of the law is confirmed by the language of Lord Hatherley, then Vice-Chancellor, in *Kavanagh* v. *Morland* (1), where he says that "if there be a devise to one for his life, and then to his issue with words of limitation superadded, as, 'to his issue and their heirs,'" then according to the decision of Lord St. Leonards in the case of *Montgomery* v. *Montgomery* (2) the issue are considered to take as purchasers, and the whole estate is given to them under these words of limitation. In the present case there is a devise to Lewis for his life, and then to his issue and their heirs, and there is no gift over in default of such issue, such as in *Denn* v. *Puckey* (3), and *Frank* v. *Stovin* (4), was held to shew that the testator contemplated a gift over in the event of an indefinite failure of issue of the body of the first taker, and consequently did not intend that the superadded words of limitation should pass the fee. Upon the whole, although I am by no means free from doubt in the matter, I believe that I am deciding in accordance with the authorities, and with the intentions of the testator in holding that the eldest son took an estate for life, followed by a remainder in fee to his issue as purchasers, if he had children born in wedlock, and a remainder in fee to his brother Evan, if he had no such children. I therefore give judgment for the plaintiff with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Crowder, Anstie, & Vizard, for Thomas Rees.*

Solicitor for defendant: *Wrentmore, for James & Co.*

(1) Kay, 16. 18 Jur. 185
(2) 3 Jones & Lat. 47.
(3) 5 T. R. 299.
(4) 3 East, 548.

E. L.

[IN THE COURT OF APPEAL.]

1882
March 18.

YOUNG & CO. *v.* THE CORPORATION OF LEAMINGTON.

Local Government Acts—Urban Sanitary Authority—Contract not under Seal—Executed Contract for construction of Waterworks—Order by Borough Surveyor appointed under Seal—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 173, 174.

The 174th section of the Public Health Act, 1875, which imperatively requires that every contract made by an urban authority, whereof the value or amount exceeds 50*l.*, must be in writing and sealed with the common seal of such authority, applies not only to an executory but also to an executed contract, although made by an agent duly appointed under seal.

The defendants, being an urban sanitary authority, by contract under seal duly employed P. to construct waterworks. One of the terms of such contract was, that if P. should make default the defendants' engineer might employ persons to finish it, and charge P. with the expense. P. made default, and the defendants' engineer, who had been appointed under seal, by contract in writing employed the plaintiffs not only to finish P.'s contract, but to execute certain additional works not specified therein. The plaintiffs executed such works, and the defendants had the benefit of them. The defendants, acting thoughout as an urban sanitary authority, approved the contract of their engineer with the plaintiffs, but none of the provisions of the 174th section of the Public Health Act, 1875, were complied with in relation to such contract:—

Held, affirming the judgment of the Queen's Bench Division (Mathew and Williams, JJ.), that such contract was not binding on the defendants.

APPEAL from the judgment of the Queen's Bench Division (Mathew and Williams, JJ.), on a special case stated by an arbitrator.

The plaintiffs were engineers, and the defendants a municipal corporation incorporated under the Municipal Corporation Acts, and the action was brought to recover a sum of money amounting to between 6000*l.* and 7000*l.*, as a balance alleged to be due from the defendants to the plaintiffs for work done and materials provided by the plaintiffs for the defendants in completing waterworks for the town of Leamington. The defendants resisted the claim on the ground, amongst others not material to the report, that the employment of the plaintiffs was not under the common seal of the corporation, and the special case was stated to raise that point alone, which turned upon the proper construction of s. 174

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of the Public Health Act, 1875 (1), the defendants having acted thoughout as an urban authority under that Act.

In addition to the facts appearing from the judgment of Lindley, L.J., the case stated that the defendants had taken possession of and accepted and received the benefit of the works and materials which were the subject of the action, and still enjoyed the benefit thereof.

The question for the opinion of the Court was whether the absence of the common seal of the corporation in the employment of the plaintiffs under the circumstances stated in the case was

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174: "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed, namely:

"1. Every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing, and sealed with the common seal of such authority. . .

"2. Every such contract shall specify the work, materials, matters or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed.

"3. Before contracting for the execution of any works under the provisions of this Act, an urban authority shall obtain from their surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise.

"4. Before any contract of the value or amount of 100*l.* or upwards is entered into by an urban authority, ten days' public notice at the least shall be given, expressing the nature and purpose thereof, and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same.

"5. Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed and their successors, and on all other parties thereto, and their executors, administrators, successors, or assigns to all intents and purposes: provided that an urban authority may compound with any contractor or other person in respect of any penalty incurred by reason of the non-performance of any contract entered into as aforesaid, whether such penalty is mentioned in any such contract, or in any bond or otherwise, for such sums of money or other recompense as to such authority may seem proper."

By s. 51 of the same Act, any urban authority may provide their district with a supply of water proper and sufficient for public and private purpurposes, and for those purposes or any of them may construct and maintain waterworks.

fatal to the plaintiffs' right to recover; judgment to be for the defendants if the Court should be of opinion in the affirmative, and for the plaintiffs if in the negative.

A Divisional Court (Mathew and Williams, JJ.) gave judgment for the defendants, and against this judgment the plaintiffs appealed.

Benjamin, Q.C., and *W. G. Harrison, Q.C.* (*Edwyn Jones*, with them), for the plaintiffs. The defendants were authorised by statute to establish productive works, and had acquired a property in such works by reason of their contract with the plaintiffs. Now that the property has become capable of producing income, it is contrary to all justice that they should retain the benefit under the contract, and yet repudiate the contract itself: *Nicholson* v. *Bradfield Union* (1); *Haigh* v. *North Brierley Union* (2); *Clarke* v. *Cuckfield Union*. (3)

[They also cited *Saunders* v. *St. Neots Union* (4); *Ecclesiastical Commissioners* v. *Merral*. (5)]

Secondly, the appointment of the borough surveyor being under seal, he had, by virtue of that appointment, power to bind the corporation: Story on Agency, ss. 52, 53; *Murray* v. *East Indian Co.* (6)

Mellor, Q.C., and *Dugdale*, for the defendants. At common law the defendants had no power to establish waterworks; all the power was derived from the Public Health Act, 1875, and depends upon s. 174 of that statute, which is imperative and not directory only, so that a contract in contravention of its terms is void: *Hunt* v. *Wimbledon Local Board* (7), and this is a rule which applies to executed as well as to executory contracts: *Frend* v. *Dennett* (8); *Crampton* v. *Varna Ry. Co.* (9)

[They also cited *Arnold* v. *Mayor of Poole* (10); *Austin* v. *Guardians of Bethnal Green* (11); *Paine* v. *Strand Union* (12);

(1) Law Rep. 1 Q. B. 620.
(2) E. B. & E. 873.
(3) 21 L. J. (Q.B.) 349.
(4) 8 Q. B. 810.
(5) Law Rep. 4 Ex. 162.
(6) 5 B. & A. 204.
(7) 4 C. P. D. 48.
(8) 4 C. B. (N.S.) 576; 27 L. J. (C.P.) 314 (at law); 5 L. T. (N.S.) 73 (in equity).
(9) Law Rep. 7 Ch. 562.
(10) 4 M. & G. 860.
(11) Law Rep. 9 C. P. 91.
(12) 8 Q. B. 326.

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Lamprell v. *Billericay Union* (1); *Diggle* v. *London and Blackwall Ry. Co.* (2); *Finlay* v. *Bristol and Exeter Ry. Co.* (3); *Smart* v. *West Ham Union.* (4)]

W. G. Harrison, Q.C., in reply.

March 18. LINDLEY, L.J. The facts stated in the special case and which are material for its decision are as follows:—

1. There was a duly sealed contract between the defendants and one Powis for the execution of certain works therein mentioned under the orders of one Jerram who was the engineer of the defendants and was duly appointed under their common seal.

2. Powis failed to perform his contract, and under a provision contained in it, the defendants' engineer Jerram became entitled to employ other persons to finish it, and to charge Powis with the expense.

3. Jerram found that in order to finish the works, it was necessary to execute additional works not comprised in Powis's contract, as well as to complete the works which were comprised in it.

4. Jerram reported this necessity to the defendants, and they by their council approved of the report; and thereupon Jerram entered into an agreement with the plaintiffs for the execution by them of the work left unfinished by Powis and of the additional works above referred to.

5. This contract was not sealed by the defendants, but the works thus agreed to be done by the plaintiffs were all done as agreed under the directions of Jerram.

6. The defendants in all these matters acted as an urban authority under the provisions of the Public Health Act, 1875. The special case as amended expressly states this as a fact; but in my opinion it is also a correct statement of the legal effect of the Municipal Corporation Act (5 & 6 Wm. 4, c. 76), s. 92, and of the Public Health Act when construed together. The Municipal Corporation Act, s. 92, enables corporations to apply their funds for the public benefit of the inhabitants and improvement of the borough, and these words are large enough to include the erection

(1) 3 Ex. 283.
(2) 5 Ex. 442.
(3) 7 Ex. 409.
(4) 10 Ex. 867; affirmed 11 Ex. 867.

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of waterworks. But the Public Health Act, 1875, contains special enactments relating to this very matter and states how contracts for the erection of waterworks are to be entered into by all urban authorities, whether municipal corporations or not. Upon general principles of construction, therefore, it appears to me that in order to decide this case, all that is necessary is to construe the Public Health Act, and to determine whether it has been complied with or not.

The Public Health Act 1875 (38 & 39 Vict. c. 55), s. 174 enacts as follows:—[The learned Lord Justice read the section.]

The contract in question was one for considerably more than 2000*l.* It ought, therefore, according to s. 174, clauses 1–4, to have been under the common seal of the defendants; and ten days' public notice ought to have been given by the defendants inviting tenders for the execution of the works. Now although it is stated in the special case that Jerram's report which led to the contract was laid before the council of the corporation and was adopted, it is nowhere stated that the contract itself was ever submitted to the council, or that the details of it were ever known to or approved by them, or that any tenders for the execution of the additional works were ever invited, and I infer that in point of fact the council never had the contract submitted to them and that no tenders ever were invited.

If the contract had been under the seal of the corporation, the plaintiffs would not have been prejudiced by the omission on the part of the corporation or its council to invite tenders: *Nowell* v. *Mayor of Worcester* (1), but the provision in the statute relating to the seal is one which has been already decided to be imperative and not directory only: *Hunt* v. *Wimbledon Board of Works* (2); and unless, therefore, the contract in question can be regarded as sealed with the common seal of the defendants, the contract is not binding on them.

It was argued that the contract was in substance and in effect under the seal of the defendants, because Jerram was appointed by the defendants under their common seal to perform certain powers and duties which included the exercise of the rights reserved in Powis's contract to the defendants' engineer, and the

(1) 9 Ex. 457. (2) 4 C. P. D. 48.

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duty of seeing to the proper execution of the works contracted for by Powis, and because upon Jerram's report the additional work was approved by the council. But I am unable to accede to this argument. The answer to it is, that this particular contract is not under the common seal of the defendants, and that to hold it to be so because Jerram was appointed under seal, and his report adopted, would be to hold that the council might lawfully delegate an important part of their duties to one of their officers, and so deprive the ratepayers of that protection which the legislature intended to afford them by requiring the common seal to be affixed to contracts of this description. The object of requiring such contracts to be under the common seal is, I apprehend, to draw the attention of the corporation, i.e., of its managing body, to each particular contract and to insure, if not the examination and discussion, at all events an opportunity for the examination and discussion, of the terms of provisions in detail of every contract by which the corporation is to be bound. This object would be entirely defeated if it were to be held that a contract not under seal, entered into by an agent appointed under seal, was a contract under seal within the true meaning of the statute which governs this case. In this case, not only was there no seal in fact, but the omission of the seal was by no means the omission of a mere form. The seal was not affixed, because the contract itself was never in fact approved by the Council, whose duty it was to consider the contract, and if approved, to authorise it to be sealed.

In Story on Agency, s. 53, it is stated that "an agent by an authority under seal might bind the corporation by his agreement not under seal, if the agreement were within the scope of his authority." But this passage cannot apply to cases in which a corporation attempts to delegate to an agent duties which can only be properly performed, after deliberation, by the corporation itself. In my opinion an authority under seal to Jerram to enter into any contract he might think fit for additional works would be ultrà vires and invalid, and would not render his contract the contract of the corporation itself, even if that contract were sealed by him. To render such a contract binding on the corporation, it would, in my opinion, be necessary for the corporation distinctly to ratify it, and in effect make his seal its own.

The last point argued for the plaintiffs was, that as the contract has been performed and the defendants have the benefit of the plaintiffs' work, labour, and materials, the defendants are, at all events, liable to pay for these at a fair price.

In support of this contention, cases were cited to shew that corporations are liable at common law, quasi ex contractu, to pay for work ordered by their agents and done under their authority.

The cases on this subject are very numerous and conflicting, and they require review and authoritative exposition by a Court of Appeal. But in my opinion, the question thus raised does not require decision in the present case. We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than 50*l.*, and contracts for 50*l.* and under; contracts for not more than 50*l.* need not be sealed and can be enforced whether executed or not, and without reference to the question whether they could be enforced at common law by reason of their trivial nature. But contracts for more than 50*l.* are positively required to be under seal, and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them. *Frend* v. *Bennett* (1) is an authority in support of this view, and was in my opinion rightly decided. The additional works there in question had been executed, and there was the common count for work and labour and materials, as well as a special count on the alleged contract, but the defendant was held not liable either at law or in equity.

It may be said that this is a hard and narrow view of the law: but my answer is that Parliament has thought it expedient to require this view to be taken, and it is not for this or any other Court to decline to give effect to a clearly expressed statute, because it may lead to apparent hardship.

For the above reasons, I am of opinion that the decision of the Court below was correct, and that this appeal ought to be dismissed with costs.

Cotton, L.J., has requested me to say that he has read this judgment and concurs with it.

(1) 4 C. B. (N.S.) 576 (at law); 5 L. T. (N.S.) 73 (in equity).

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8 Applas 522.

BRETT, L.J. I have come to the same conclusion,—after endeavouring for a very long time to come to another—upon the ground that the defendants were acting as an urban sanitary authority, so that the statute and the former decision of this Court apply exactly to the case. I think that the mere want of seal prevents the plaintiffs from recovering, and I am further of opinion, having read all the cases on the point, that the fact that the defendants had the benefit of the contract will not prevent them from setting up the statute in answer to the plaintiffs' claim. The mere want of a seal is a complete bar.

Appeal dismissed.

Solicitors for plaintiffs: *John Mackrell & Co.*

Solicitor for defendants: *H. Tyrrell, for H. C. Passman, Town Clerk, Leamington.*

J. E. H.

Feb. 28.

THE CORPORATION OF PETERBOROUGH, APPELLANTS; THE OVERSEERS OF THE PARISH OF THURLBY, AND OTHERS, RESPONDENTS.

Practice—Quarter Sessions—Case stated—12 & 13 *Vict. c.* 45, *s.* 11—*Agreement for entry of Judgment according to the opinion of the Court*

12 QBD 2

A case stated for the opinion of the Queen's Bench Division, under s. 11 of 12 & 13 Vict. c. 45, should contain a statement of the agreement of the parties that judgment in conformity with the decision of the Court may be entered at Quarter Sessions in the manner provided by the section.

IN a case stated under s. 11 of 12 & 13 Vict. c. 45 (1) for the opinion of the Queen's Bench Division, it was not stated, nor did

(1) Sect. 11 enacts that at any time after notice given of appeal to any Court of general or quarter sessions of the peace, against any judgment, order, rate, or other matter (with certain exceptions) for which the remedy is by such appeal, "it shall be lawful for the parties, by consent, and by order of any judge of one of the superior courts of Common Law at Westminster, to state the facts of the case in the form of a special case for the opinion of such superior Court, and to agree that a judgment in conformity with the decision of such Court, and for such costs as such Court shall adjudge, may be entered on motion of either party at the sessions next or next but one after such decision shall have been given; and such judgment shall and may be entered accordingly, and shall be of the same effect in all respects as if the same had been given by the Court of general or quarter sessions upon an appeal duly entered and continued."

it appear by the order of the judge, that the parties had agreed that judgment might be entered at quarter sessions in conformity with the decision of the Court.

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CORPORATION OF PETERBOROUGH v. OVERSEERS OF THURLBY.

Crump and *Gaches*, for the appellants.
Webster, Q.C., and *Speke*, for the respondents.

THE COURT (Field, J., and Huddleston, B.) directed the case to be struck out of the paper, on the ground that the parties had not agreed that the judgment should be entered as required by the Act.

Case struck out.

Solicitors for appellants: *Speechley, Mumford, & Landon, for W. D. Gaches, Peterborough.*
Solicitors for respondents: *Keen & Rogers, for J. L. Bell, Bourn.*

W. A.

[IN THE COURT OF APPEAL.]

MITCHELL AND ANOTHER *v.* HOMFRAY.

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March 22.

Gift—Fiduciary Relation—Physician and Patient—Independent Advice.

Although a gift made to a person standing in a confidential relation to the donor, as by a patient to a physician, may be voidable, yet, if after the confidential relation has ceased to exist, the donor intentionally elects to abide by the gift, and does in fact abide by it, it cannot be impeached after his death, even if it is not proved that the donor was aware that the gift was voidable at his election.

The plaintiffs were executors of G., to whom the defendant had acted as medical adviser. G. made a gift of 800*l.* to the defendant. At the time of the gift no independent advice was given to G., and the relation of physician and patient then existed; but the defendant had not been guilty of any undue influence, and after the relation of physician and patient had ceased, G. elected to abide by the gift, and did in fact abide by it during the rest of her life. It was not proved that G. was aware that the gift was voidable:—

Held, that the gift made by G. to the defendant could not be impeached after her death.

Rhodes v. *Bate* (Law Rep. 1 Ch. 252) commented on.

ACTION by the executors of Mrs. Geldard to recover a sum of 800*l.* from the defendant, who had acted as her medical attendant.

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The case had been tried twice. It was first tried at the Durham summer assizes, 1879, before Stephen, J. The jury found in favour of the defendant, and the Exchequer Division afterwards discharged a rule for a new trial obtained by the plaintiffs. The Court of Appeal ordered a new trial (1), and suggested that certain questions should be left to the jury upon the second trial. The case was tried a second time before Stephen, J., and a special jury at the Leeds summer assizes, 1880, and the following were the material facts:—

In the year 1871 Mrs. Geldard gave the defendant two cheques for 500*l.* and 300*l.* respectively, in order to enable him to buy a house. Mrs. Geldard was then living at Gainford, and the defendant had been for some time her medical adviser. He alleged that the gift was made in accordance with the wish of Mrs. Geldard's husband, who had died some time previously, and to whom also he had for a long period acted as medical adviser. The defendant also alleged that he had agreed to pay to Mrs. Geldard an annuity of 40*l.* for her life, and that he had paid it from the time of the gift to himself until her decease, Mrs. Geldard on several occasions signing receipts for the amounts paid to her. In 1872 Mrs. Geldard ceased to live at Gainford and went to reside at Barnard Castle, about eight miles distant, where she continued to reside until her death, which happened in July, 1876. From the time when Mrs. Geldard went to reside at Barnard Castle, the defendant ceased to act as her medical attendant. It was admitted at the trial that Mrs. Geldard had not received any independent advice at the time when the gift was made, and that at that time the defendant was acting as her medical adviser.

In answer to the questions left by Stephen, J., the jury found that the advance of 800*l.* was a gift and not a loan; that there was no undue influence; that the relation of patient and medical man came to an end when Mrs. Geldard went to Barnard Castle in 1872, and after that relationship had been ended, and after any effect produced by it had been removed, she intentionally abode by what she had done; and that the signature of the receipts was not obtained from Mrs. Geldard by fraud.

(1) Weekly Notes (1880), 119.

Stephen, J., entered judgment for the defendant on the findings of the jury.

The plaintiffs appealed.

March 21, 22. *Digby Seymour, Q.C.*, and *Chadwyck Healey* (*Yarborough Anderson*, with them), for the plaintiffs. The only acquiescence of the testatrix in the gift was of a negative character.

[LORD SELBORNE, L.C. The gift to the defendant was merely a voidable transaction; he must prove that it was righteous, and that the testatrix conferred it voluntarily and deliberately, knowing the nature and effect of her act: *Cooke* v. *Lamotte*. (1)]

The defendant did not make a reasonable use of the confidence placed in him by the testatrix, and this is sufficient to avoid the gift: *Gibson* v. *Jeyes* (2); *Billage* v. *Southee*. (3) The defendant has not proved that the testatrix of her own free will conferred the gift, and therefore he cannot retain it: *Rhodes* v. *Bate* (4); *Dent* v. *Bennett*. (5) No doubt the findings of the jury create a difficulty in the plaintiffs' way; but they must be taken together with the admission that the testatrix had no independent advice. An analogy may be found in the doctrine of election: no person can be said to "elect," unless he has a knowledge of his rights. The gift to the defendant was so improvident that the testatrix cannot have understood the nature of her act; and this is sufficient to avoid the transaction: *Anderson* v. *Elsworth*. (6) The gift was not ratified or confirmed at a subsequent time: *Stump* v. *Gaby*. (7) The jury were not asked whether the testatrix had knowledge of her rights, and whether she knew that the gift was impeachable.

Alfred Wills, Q.C. (*Candy*, with him), for the defendant. Even if the gift was in the first instance voidable, the testatrix elected to abide by it for some years before her death; and lapse of time is sufficient to uphold a transaction which in the first instance was impeachable: *Gregory* v. *Gregory* (8); *Wright* v. *Vanderplank*. (9)

(1) 15 Beav. 234.
(2) 6 Ves. 266.
(3) 9 Hare, 534.
(4) Law Rep. 1 Ch. 252.
(5) 4 My. & Cr. 269.
(6) 3 Giff. 154.
(7) 2 D. M. & G. 623.
(8) G. Coop. 201.
(9) 8 D. M. & G. 133.

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If an infant does not repudiate a contract made by him during his minority after he has attained his majority, he is bound by his acquiescence: *In re Constantinople and Alexandria Hotel Co.* (1); and the principle applies equally to the present case, when the testatrix had ceased to be under the influence of the defendant. *Hatch* v. *Hatch* (2) is distinguishable, because in that case it was proved that the person, who had made an improvident gift, never was her own mistress. In some cases a transaction between a solicitor and his client may be upheld; and it is liable to be impeached only where there has been a want of good faith on the part of the solicitor: *Holman* v. *Loynes* (3); *Re Holmes' Estate.* (4) A similar principle applies to a transaction between a physician and his patient: *Pratt* v. *Barker* (5); *Billage* v. *Southee.* (6) A gift to a parent or to one standing in loco parentis may be good, provided the donor is acting from an entirely free and unfettered judgment: *Archer* v. *Hudson.* (7) In the present case it does not appear that the defendant was guilty of any fraud; and the existence of fraud is a very material element in determining whether a gift can be upheld: *Gibson* v. *Russell.* (8)

Chadwyck Healey, in reply. The effect of undue influence cannot be removed, unless there be full knowledge how matters really stand: *Moxon* v. *Payne.* (9) The testatrix did not acquiesce in the gift to the defendant, so as to deprive her executors of the right to set it aside: *Ffooks* v. *South Western Ry. Co.* (10)

LORD SELBORNE, L.C. This case has caused some embarrassment. It ought to have come before us in such a shape that the whole facts should be presented for our consideration and judgment. It is very embarrassing that we should be limited to a discussion of the findings of the jury; but the course has not been taken of trying the case without a jury: it has been tried twice with a jury, and it would be unfortunate it should go before a jury a third time. When this case was before this Court on a

(1) Law Rep. 5 Ch. 302.
(2) 9 Ves. 292.
(3) 4 D. M. & G. 270; 18 Jur. 839.
(4) 3 Giff. 337. 8 Jur. N.S. 252.
(5) 1 Sim. 1; 4 Russ. 507.
(6) 9 Hare, 534.
(7) 7 Beav. 551.
(8) 2 Y. & C. Ch. 104.
(9) Law Rep. 8 Ch. 881.
(10) 1 Sm. & G. 142. 17 Jur. 365

previous occasion (1), certain questions to be left to the jury were suggested, and their effect may be stated as follows: Was the advance of 800*l.* a gift, was there an undue influence, and when was it removed? Was there an intention of abiding by the advance if it was a gift? Was the signature of the testatrix obtained by fraud? This is the substance of the questions put to the jury, and both parties were content that these questions alone should be asked. We have been pressed during the argument with the suggestion, that the jury ought to have been asked whether the testatrix was aware that the gift made to the defendant was impeachable: if it was wished that this question should be put, it ought to have been mentioned at the trial, and we ought to hold that both parties were prepared to pass it over. No doubt the questions as to the state of the mind of the testatrix were very important: there was no evidence that she actually knew that the gift was impeachable; but she was dead at the time of the trial; and the findings of the jury imply all that ought to be inferred in the defendant's favour; they have found that the relationship of physician and patient had come to an end long before the death of the testatrix, and that she intentionally abode by what she had done. It must be held that whether she knew or not that she had power to retract the gift, she was determined to abide by her acts; this is not a case of mere acquiescence; she determined that she would not undo what she had done. This being the state of facts, I do not think that any authority goes the length of saying that her representatives after her death can do that, which if she had lived she herself would not have done. In the present case, it is admitted that the testatrix had no independent advice. In *Rhodes* v. *Bate* (2) it was laid down in clear terms that in order to uphold a gift made to a person standing in a confidential relation, the donor must have had competent and independent advice in conferring it. This is undoubtedly the rule, so long as the confidential relation exists; but it is not laid down in *Rhodes* v. *Bate* (2) that advice of that kind is necessary, when the confidential relation has come to an end, and the donor is no longer subject to its influence. Not very much authority exists from which we can derive assist-

(1) Weekly Notes (1880), 119. (2) Law Rep. 1 Ch. 252.

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ance. In *Dent* v. *Bennett* (1) the Lord Chancellor remarks that "there is an absence of all evidence of the testator having at any time recognized, or in any manner given any proof of approval of the agreement, or of any consciousness of its existence." That was a case in which the plaintiff, as executor, sought to set aside an alleged agreement by his testator to pay a large sum of money to the defendant, who was a surgeon and apothecary. The words of the Lord Chancellor do not go very far; but they shew that he thought that evidence of an intention to recognise a gift might be material. In *Wright* v. *Vanderplank* (2) Turner, L.J., used language which was not quite like that employed by him in *Rhodes* v. *Bate*. (3) He seems to have considered in *Wright* v. *Vanderplank* (2) that a gift from a child to a parent will be good when the parental influence is disproved, or that influence has ceased. I know of no difference between solicitor and client on the one hand, and parent and child on the other. Turner, L.J., said that he was not of opinion that a positive act was necessary to shew that the donor had elected to abide by the gift, all that was required was proof of a fixed, deliberate, and unbiassed determination that the transaction should not be impeached. This was the view of Turner, L.J., in *Wright* v. *Vanderplank*. (4) In that case, the evidence was strong in favour of upholding the gift. The daughter appears to have been aware that the transaction was impeachable, but she elected to abide by the gift to her father; and it was held that after her death the gift could not be set aside; her acquiescence afforded a defence to a suit to impeach it. Of the other cases cited before us *In re Holmes' Estate* (5) seems somewhat in point; that was a case of an alleged gift to a solicitor from his client, and the Vice-Chancellor expressed an opinion that when the influence, which a solicitor may be supposed to exert over his client, has been removed, the solicitor may become the object of his client's bounty, and may receive from him a gift, which will be valid both at law and in equity. I think that these authorities support the conclusion at which we have arrived, and upon the findings of the jury the judgment ought not to be disturbed.

(1) 4 My. & Cr. 269, at p. 275.
(2) 8 D. M. & G. 133, at p. 146.
(3) Law Rep. 1 Ch. 252, at p. 257.
(4) 8 D. M. & G. 133.
(5) 3 Giff. 337.

BAGGALLAY, L.J. The materials, upon which our judgment must be founded, consist of the facts found by the jury and the admissions made at the trial. It is found that the advance of 800*l.* was a gift, and not a loan. I have heard nothing to make me differ from the finding of the jury on this head. It was admitted that there was no independent advice of any kind at the time when the gift was made. I think that this circumstance will prove to be immaterial. The proposition has been repeatedly laid down in equity that gifts made to persons standing in a confidential relation cannot be upheld. According to this doctrine, the gift to the defendant may have been originally voidable, but the relation of patient and physician had ceased for some years before the donor's death. This circumstance gets rid of a difficulty which might otherwise have existed. The relation had ceased three years before the death of the testatrix, and the jury have found that she had elected to abide by it. It is impossible to avoid giving some effect to the word "intentionally" in the question, to which the jury have given an affirmative answer. I do not propose to go at length into questions of detail. The testatrix was determined to abide by the gift, and did abide by it. None of the cases are against our holding that the gift cannot now be impeached. If the transaction was not formally ratified, it was at all events adopted, and for three years before her death, the testatrix kept to her determination not to impeach it.

BRAMWELL, L.J., concurred.

Judgment affirmed.

Solicitor for plaintiffs: *A. Scott Lawson.*
Solicitor for defendant: *A. Burn, for Steavenson, Darlington.*

J. E. H.

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March 22.

KAY *v.* FIELD & CO.

Shipping—Charterparty, Construction of—Customary manner of Loading—Detention by Frost—Demurrage.

By the terms of a charterparty the ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of rail iron; the cargo to be loaded as fast as steamer could take on board and stow within the customary working hours of the port, commencing when steamer was in berth and ready to load; and if longer detained merchants to pay steamer 30*l.* per day demurrage. "Detention by frost, floods, &c., not to be reckoned as lay days."

The shipowner, when the charterparty was made, did not know who were the freighters' agents at Cardiff. There were about six shippers of rail iron there, all of them (with the exception of the freighters' agents) having wharves in the West or East Bute Dock. The agents' wharf was at a distance from the docks upon a canal communicating with the West Bute Dock, and their rail iron was loaded on ships berthed in the East Bute Dock by means of lighters passing down this canal through the West Bute Dock, and from thence down a smaller canal connecting the two docks. The other shippers loaded in the East Bute Dock, either from the quay or by lighters coming alongside the ship from the wharves in the East Bute Dock, or by lighters from the West Bute Dock, passing down the connecting canal.

The ship, on arrival, was berthed in the East Bute Dock, and the loading was commenced, but shortly afterwards was stopped for sixteen days by frost, which covered the canal from the agents' wharf to the West Bute Dock with ice and prevented the passage of the lighters, though the water in the docks was not frozen:—

Held, by Pollock, B., that, as the conveyance of the iron in lighters from the agents' wharf through the canals was part of the act of loading, and one of the customary modes of loading in the port, the exception in the charterparty with respect to detention by frost applied to relieve the freighters from liability to demurrage.

Reversed on appeal 10 QBD 241 C.A.

FURTHER CONSIDERATION.

Claim by shipowner against freighters under a charterparty for fifteen days' demurrage at 30*l.* per day.

At the trial before Pollock, B., without a jury, at the Swansea Summer Assizes, 1881, all matters of fact in the cause were referred to a special referee to report thereon to the learned judge. The material facts stated in the report were as follows:—

By a charterparty made the 18th of December, 1880, it was agreed (inter alia) between the plaintiff and the defendants that

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the steamer *Cid* should proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a full and complete cargo of rail iron, say about 1700 tons, "The cargo to be loaded as fast as steamer can take on board and stow within the customary working hours of the port (Sundays and holidays excepted), commencing when steamer is in berth and ready to load . . . . Detention by frost, floods, riots, and strikes of workmen, accidents to machinery, or quarantine, not to be reckoned as lay days. The cargo to be laden at not less than two hatchways at the same time and, when so required by charterers, steamer to load at night."

There are two docks at Cardiff, the East Bute Dock and the West Bute Dock, connected by a canal with locks at both ends. The West Bute Dock is also connected by a junction canal with the Glamorganshire Canal.

Iron rails shipped at Cardiff are almost entirely manufactured by some five or six makers having their works at some distance from Cardiff, Messrs. Crawshay & Co. being one of such makers.

With the exception of Crawshay & Co. all the manufacturers rent wharves or quays in the docks themselves for their own exclusive use, some of them in the East Bute Dock and some in the West Bute Dock.

Crawshay & Co., who manufactured their rails about twenty-four miles from Cardiff, have no exclusive wharf in either dock, but they have a wharf on the Glamorganshire Canal nearly opposite the junction canal leading from the Glamorganshire Canal to the West Bute Dock.

There are in the docks berths alongside the dock quays which are open to the public in turn on application to the dock authorities. Vessels are also moored in tiers in the dock basins for the purpose of being loaded with rails and other cargo from lighters brought alongside. A railway runs along the quays round both docks.

Large steamers cannot go into the West Bute Dock, and shippers having wharves in that dock send their iron by lighters into East Bute Dock to load vessels that may be in that dock.

Crawshay & Co. forward their iron from their wharf in lighters alongside vessels in the East Bute Dock, and the vessels are

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moored at the top of that dock for the purpose of receiving Crawshay & Co.'s cargo from their canal wharf.

Rail iron is not kept in stock, but the manufacturers make the rails according to section and specification furnished by the purchasers on giving their order to the manufacturer.

Crawshay & Co. have occupied their present premises on the canal for about thirty years. Their premises are sufficient for the reasonable conduct of their business.

The *Cid* was in fact to be loaded with rails supplied by Crawshay & Co., but there is no evidence that the shipowner was aware of this when he entered into the charterparty, or that he knew of the custom of the port of Cardiff, or of the way in which Crawshay & Co. conducted their business.

On the 8th of January, 1881, in anticipation of the *Cid's* arrival, the whole of the iron intended for her use had been sent down from the works and deposited at the wharf. The *Cid* arrived at Cardiff on the 11th of January, 1881, and was berthed at the top of the East Bute Dock, and the master on that day gave notice to Crawshay & Co. of the steamer's arrival, and that she was ready to receive her cargo. Lighters loaded with the *Cid's* iron arrived at the East Bute Dock on the evening of the 11th of January. The loading commenced, at both hatches, on the 12th of January, and was continued, with some interruption, owing to a frost having set in by reason of which the passage of the lighters down the canals was hindered, until the 15th of January.

From Sunday, the 16th of January, until Monday, the 31st of January, all the usual approaches from Crawshay & Co.'s wharf to the docks were impassable, and the loading was wholly discontinued. Demurrage was claimed under the charterparty in respect of this period.

During all this time the docks themselves were not frozen. Steamers and lighters could move about and vessels could have gone out to sea, but no reasonable means could have been adopted to convey the iron from the wharf into the dock, neither could any marketable railway iron have been obtained from any other source.

The referee found and reported that every exertion was made

to forward the iron after the canal communication was practically open, and had it not been for the frost the vessel would have been loaded according to the custom of the port within a reasonable time.

McIntyre, Q.C., and *Brynmôr Jones*, for the plaintiff.

Channell (*Dillwyn*, with him), for the defendants.

The following authorities were cited in argument: *Fairbridge* v. *Pace* (1); *Tapscott* v. *Balfour* (2); *Lawson* v. *Burness* (3); *Postlethwaite* v. *Freeland* (4); *Hudson* v. *Ede* (5); *Kearon* v. *Pearson* (6); *Fenwick* v. *Smalz.* (7)

Cur. adv. vult.

March, 22. POLLOCK, B. In this case the plaintiff's claim is for demurrage for delay in loading the cargo of the ship *Cid* which was chartered by the defendants under a charterparty made by the plaintiff, shipowner, with the Messrs. Austin Brothers, as the agents of the defendants, the freighters. The important question is whether, upon the facts found by the special referee's report, the defendants bring themselves within the exception in the charterparty in respect of delay caused by frost, &c.

The usage of the port is found by the report to have been unknown to the plaintiff when the charterparty was made, but in *Hudson* v. *Ede* (5), the Court clearly laid down the proposition that ignorance of any usage of trade or custom of the port on the part of the shipowner would be immaterial, provided there existed a well-known custom or usage of loading in the port. It is truly alleged on behalf of the plaintiff that the charterparty contains no mention whatever of Messrs. Crawshay & Co., or their iron, or their wharf. The words are general that the ship shall proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of rail iron. I agree that any judgment would be erroneous which proceeded on the assumption that it was within the contemplation of the parties that any special advantage was to be gained by

(1) 1 C. & K. 317.
(2) Law Rep. 8 C. P. 46.
(3) 1 H. & C. 396.
(4) 4 Ex. D. 155.
(5) Law Rep. 2 Q. B. 566; Law Rep. 3 Q. B. 412.
(6) 7 H. & N. 386; 31 L. J. (Ex.) 1.
(7) Law Rep. 3 C. P. 313.

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dealing with Crawshay & Co. In my view Crawshay & Co. must be treated only as shippers of iron within the range of the Cardiff Docks of which the East Bute Dock is one; and in considering what is the "customary manner" of loading, all the modes of loading employed by persons who load in those docks must be taken into consideration. It is objected by the plaintiff's counsel that the words "customary manner" apply only to the actual mode of loading, and not to the place in the port at which the loading is to be effected. I agree with that contention, which is supported by *Tapscott* v. *Balfour* (1), and *Lawson* v. *Burness*. (2) But here the argument for the defendants is not applied to the place in the port to which the vessel proceeded, but it is said that, being at that place, there were several customary modes of loading applicable, and that the defendants adopted one of them. In support of that contention the defendants rely on the findings in the report, and I think the result of these findings is that there are four different modes whereby, according to the customary manner of loading, iron is loaded on vessels in the East Bute Dock. It is loaded from the wharf; from lighters coming alongside the vessel from the wharf; from lighters coming through the canal connecting the West with the East Bute Dock, and from lighters coming from Crawshay's wharf down the Glamorganshire and Junction Canals to the West Bute Dock, and thence down the canal which connects the West and East Bute Docks.

Under the circumstances the case seems to me the same as if the iron had been stored in the West Bute Dock. In that case, I think the findings in the report shew that the customary manner of loading would be by lighters coming down the canal which connects the two docks. It is going but one step further to say that some iron, namely that of Crawshay & Co., is brought in the same way down the Glamorganshire and Junction Canals, and is in the same category.

I am of opinion therefore that frost which stops the canal connecting the West Bute Dock with the Glamorganshire canal is frost which is within the meaning of the exception in the charter

(1) Law Rep. 8 C. P. 46. (2) 1 H. & C. 396.

taken in connection with the words, "load in the customary manner."

There is no case exactly like this, but I think *Hudson* v. *Ede* (1) goes a long way to govern it. The judgment of the Exchequer Chamber in that case proceeded upon the ground that the conveyance between Galatz and the ship at Sulina might be considered as part of the act of loading. It is true that it differs from the present case in this, that there the whole of the cargoes loaded at Sulina had to be brought from Galatz, whilst here the mode of loading is only one out of several customary modes. But in the present case iron to be loaded from Crawshay's wharf must certainly be taken to be within the contemplation of the parties to the charterparty, as being within the designation "a cargo of rail iron to be loaded in the customary manner from the agents of the freighters." If iron from Crawshay's wharf is within the charterparty, I think the charterer is entitled to select any one of the customary modes of loading.

I am therefore of opinion that the defendants are brought within the exception in the charterparty. A further argument for the plaintiff was based on the case of *Kearon* v. *Pearson*. (2) It was said that a stipulation that all the cargo should be ready for loading at the East Bute Dock on the ship's arrival should be implied here. I agree that if the cargo had been at Crawshay's manufactory, when the *Cid* arrived, it would not have been ready for loading, but I find and hold that iron stored at Crawshay's wharf is ready for loading within the custom of the port of Cardiff.

I am therefore of opinion that judgment should be entered for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Ingledew & Ince, for Ingledew, Ince, & Vachell, Cardiff.*

Solicitors for defendants: *Nichol, Son, & Jones.*

(1) Law Rep. 2 Q. B. 566; Law Rep. 3 Q. B. 412.

(2) 7 H. & N. 386; 31 L. J. (Ex.) 1.

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March 22.

COVERDALE, TODD, & CO. *v.* GRANT & CO.

Shipping — Charterparty—Commencement of Lay Days—"Frost preventing Loading."

By the terms of a charterparty the ship was to proceed to the port of loading and there load a cargo of iron in the customary manner from the agents of the freighters. Cargo to be supplied as fast as steamer can receive. Time to commence from the vessel being ready to load, and ten days on demurrage over and above the said lay days at 40*l.* per day. ("Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading; in which case owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.") On the ship's arrival the loading was commenced, but shortly afterwards was wholly stopped for five days through frost:—

Held, by Pollock, B., that the exception in the charterparty did not apply only to cases in which the commencement of the loading was prevented through any of the specified causes, but that it applied also where delay in supplying cargo occurred after the loading had commenced, and therefore that the freighters were not liable to demurrage.

Reversed in Ex. Ch. 11 Q.B.D. 83; C.A.

FURTHER CONSIDERATION.

Claim for demurrage and damages for detention of a vessel chartered by the defendants from the plaintiffs.

At the trial, before Pollock, B., without a jury, at the Swansea Summer Assizes, 1881, all matters of fact in the cause were referred to a special referee to report thereon to the learned judge. The material facts stated in the report were as follows:—

By a charterparty made the 16th of December, 1880, it was agreed between the plaintiffs and defendants that the steamer *Mennythorpe* should proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a full and complete cargo of about 1800 tons of bar or bundle iron.

"Cargo to be supplied as fast as steamer can receive at all hatchways for loading, and to be discharged as fast as customary with steamers.

"Time to commence from the vessel being ready to load and unload and ten days on demurrage, over and above the said lay days, at 40*l.* per day. [Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the

loading and unloading; in which case owners to have the option of employing the steamer in some short voyage trade, until receipt of written notice from charterers that they are ready to resume employment without delay to the ship."]

The *Mennythorpe* arrived at the East Bute Dock, Cardiff, on Monday, the 10th of January, 1881, and on the following day began to take in cargo from the agents of the freighters according to the charterparty.

On the 13th of January frost set in, and on the two following days the passage of the lighters, in which part of the cargo had to be carried down canals to the East Bute Dock, was delayed by ice.

From the 16th to the 21st of January the canals were rendered impassable by the ice, and the supply of cargo to the vessel was wholly stopped. The loading recommenced on the 21st of January and was completed by the 3rd of February. Demurrage, and in the alternative damages for detention of the vessel, were claimed by the shipowners in respect of the period between the 16th and the 21st of January.

The referee found as a fact that the delay in loading the *Mennythorpe* was caused by the frost alone, and that the iron could not have been brought into the dock by any reasonable means, neither could the charterers have obtained or loaded the vessel with a like cargo from any other place or by any other means.

Brynmôr Jones (*Sir F. Herschell, S.G.*, with him), for the plaintiffs.

Bowen Rowlands, Q.C., and *Moulton*, for the defendants, were not heard.

Cur. adv. vult.

March 22. POLLOCK, B. In this case, so far as the same principle is involved as in *Kay* v. *Field* (1), I give judgment for the defendants for the same reasons. But it has been argued for the plaintiffs that there are points of difference in this charterparty which should lead me to a different conclusion. It is said

(1) Part of the *Mennythorpe's* cargo was to be supplied by Messrs. Crawshay & Co., and with respect to that part the same question arose as in *Kay* v. *Field*, ante, p. 594.

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that the exception with respect to frost applies only to the clause of the charterparty in which it occurs, i.e., that the exception only applies to the "time to commence" and not to the "cargo to be supplied." I cannot think that is the proper construction. The two clauses must be read together. It is said that the exception applies only to cases in which the loading had not actually commenced; that here, the loading having actually commenced before the frost set in, the charterers cannot have the advantage of the exception, which is said to apply only in the event of frost, floods, or other inevitable accident having "prevented" in the sense of having come before the commencement of loading. Perhaps the strict grammatical and original meaning of the word "prevent" to a great extent supports the argument, but I think in construing this charterparty the meaning which "prevent" has acquired in popular language must be put upon the word. "Preventing the loading" means preventing in the sense of stopping it, either before it has been commenced or whilst it is going on. It is said that the stipulation in the exception that the steamer might take some short voyage during the continuance of the frost implies that the vessel must be empty when the exception applies, because it could not be contemplated that she would engage in a new adventure with cargo already on board. That argument is suggested rather upon the ground of inconvenience to the shipowners than upon the grammatical construction of the charterparty. Unless the inconvenience appears so clear that the parties could not reasonably have contemplated its occurrence I cannot give weight to the argument, which I think fails. The subsequent words "resume employment" in the exception seem to show that the loading might have commenced.

I am therefore of opinion that the differences suggested with respect to this charterparty ought not to lead me to a different conclusion than I arrived at in the case of *Kay* v. *Field*. (1)

Judgment for the defendants.

Solicitors for plaintiffs: *Shum, Crossman, Crossman, & Pritchard, for Turnbull & Tilley, West Hartlepool.*

Solicitors for defendants: *Clarke, Rawlings, & Clarke.*

(1) Ante, p. 594.

W. A.

RUMBALL, APPELLANT; SCHMIDT, RESPONDENT. 1882

March 22.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 156, 252—*Continuing Offence—Information—Time.*

By s. 156 of the Public Health Act, 1875, it is an offence to bring forward or build any addition to a house in a street beyond the front of the house or building on either side without the consent of the urban authority; and "any person offending against this enactment shall be liable to a penalty not exceeding 40*s.* for every day during which the offence is continued after written notice in this behalf from the urban authority:"—

Held, that an offence to which the penalty was applicable continued so long as the addition to the house was maintained after written notice from the urban authority, notwithstanding that the addition was completed before the notice was given.

Marshall v. *Smith* (Law Rep. 8 C. P. 416) distinguished.

CASE stated by justices under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

On the 21st of November, 1881, an information was laid before justices by the respondent, as the building surveyor of the Local Board of Eastbourne (being the urban sanitary authority of the district) against the appellant, for an offence against s. 156 of the Public Health Act, 1875, in building an addition to and bringing forward a house, belonging to the appellant and forming part of a street in Eastbourne, beyond the front of the houses on either side the same house, and in continuing the said offence, after written notice to him in that behalf from the urban sanitary authority, for the space of thirty-seven days, from the 14th of October to the 19th of November, both inclusive. On the hearing of the information the justices convicted the appellant, and imposed a penalty upon him of 1*s.* a day for the thirty-seven days, with costs.

The material facts stated in the case were as follows:—

The appellant, in April, 1881, being the owner of the house in question, erected an addition upon the fore-court in front thereof, and brought out such addition considerably beyond the fronts of the houses on either side. This was done without any consent on the part of the urban sanitary authority.

On the 2nd of May, 1881, the appellant was duly served with notice from the urban authority that he had committed an

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offence against s. 156 of the Public Health Act, 1875, and that he would be liable to a penalty not exceeding 40s. for every day during which the said offence was continued after receipt of the notice.

Between the 2nd of May, and the 14th of October, 1881, the appellant was three times summoned by the urban authority before justices and convicted for continuing the offence above-mentioned. Upon two of those occasions a fine was imposed, which he paid, and on the third he undertook to remove the addition complained of, but he had failed to do so up to the time when the present information was laid.

At the hearing of the information on the 5th of December, 1881, it was contended for the appellant (inter alia) that the information was not laid within the time limited by statute, and that the alleged offence was completed upon the building of the addition complained of, and that the charge of continuing the offence was unsupported by evidence.

If the Court were of opinion that the conviction upon this information was right, the conviction was to stand, but if otherwise the information was to be dismissed.

Lee Roberts and *Pardoe*, for the appellant. The offence under s. 156 of the Public Health Act, 1875, (1) was completed in April 1881, when the addition to the house was built, and the information not having been laid within the period of six months limited by s. 252, was too late. The offence was not continued, within the meaning of s. 156, after the building was completed: *Coggins* v. *Bennett*. (2) Where it is intended to make an offence a continuing offence after its completion, express words are found in

(1) By s. 156: "It shall not be lawful in any urban district, without the written consent of the urban authority, to bring forward any house or building forming part of any street or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto, beyond the front of the house or building on either side of the same."

"Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued, after written notice in this behalf from the urban authority."

Sect. 252: "Any complaint or information made or laid in pursuance of this Act, shall be made or laid within six months from the time when the matter of such complaint or information respectively arose."

(2) 2 C. P. D. 568.

the statute, as in s. 158, where the words are that the offence "shall be deemed to be a continuing offence." In *Marshall* v. *Smith* (1) the by-law, upon the construction of which the decision of the Court turned, was similar in terms to s. 156. That case is a direct authority in the appellant's favour.

Gore, for the respondent. Sect. 156 makes it an offence to continue the addition to the house beyond the line of the street after notice from the urban authority. If the appellant's contention is right, if he completed the addition without the knowledge of the urban authority, he would be entitled to maintain it for ever. *Marshall* v. *Smith* (1) is wholly different from this case. There the general by-law with respect to continuing offences followed a number of by-laws, to some of which it was applicable, and not to others. The Court held that the general by-law could only apply to a by-law enacting an offence "susceptible of continuance," and found as a fact that the offence to which it was sought to be applied was not susceptible of continuance. In the present case the provision in s. 156 with respect to penalties for continuing the offence is part of the very section which prohibits the offence. The legislature in effect have said that the offence is susceptible of continuance, because they have imposed a penalty for its continuance. The continuing is the only offence for which the penalty can be imposed.

In *Marshall* v. *Smith* (1) too, the Court were dealing with a by-law which they would have held unreasonable had they not construed it as they did. And there was another appropriate remedy, because the local board had power to make a by-law enabling them to pull down party walls maintained in contravention of their by-laws. Here the urban authority had no such power; s. 156 contains the only provisions in the Act with respect to additions to houses, and the urban authority's power to make by-laws is limited by s. 157, and does not extend to such additions.

Pardoe, replied.

GROVE, J. I should be very unwilling to differ from the decision (even if I was not bound by it) of the two learned judges

(1) Law Rep. 8 C. P. 416.

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who decided *Marshall* v. *Smith* (1); but looking at their judgments and at the section we have to construe in the present case, I do not think they would have differed from this Court in their construction of this section had it come before them. The reasoning in *Marshall* v. *Smith* (1) is applied to different language, occurring in a by-law, and to different facts.

The by-law, though similar in terms to the section in question here with respect to penalties for continuing offences, followed a number of by-laws made by the corporation, and might be applicable to some and not to others of the cases provided for by the preceding by-laws. Here the provision with respect to penalties for a continuing offence is part of the whole section. Without it the first part of the section becomes almost meaningless; it would not amount to more than a bare expression of opinion by the legislature. The offence is created by the first part of the section, and the second, which is the punitive part, provides the penalty.

If the Court adopted the appellant's construction an absurdity would result which could not have resulted in *Marshall* v. *Smith* (1), viz., that, if a person managed to complete the addition to his house without the local board having observed it, and without their having given him the written notice to discontinue mentioned in the section, so long as he stayed his hand he would not be subject to any penalty under the Act. The local board would be left without remedy whatever inconvenience might be caused with respect to the line of houses in the street. They have no power to make a by-law enabling them to pull down the projection, as the corporation had in *Marshall* v. *Smith*. (1) There would be no offence to which the penalty could be applied if the building was completed without notice from the urban authority to discontinue, for it is to be observed that no penalty is attached by the section to bringing forward the addition, but only to continuing it after written notice.

The offence against the earlier part of the section may or may not be the subject of indictment. At all events the object of the legislature was to give the summary remedy specified in the second part of the section in place of an indictment. The fact that the penalty is imposed by the same section which declares

(1) Law Rep. 8 C. P. 416.

the offence shews, I think, that the fair meaning of the section is this: The owner of a house is prohibited from bringing it forward beyond the line of the street without the leave of the urban authority; if the bringing forward is completed without such leave, and an inconvenience (perhaps not of such a nature as to be the subject of an indictment) results, it is conceivable that the urban authority may not think well to object; but if they do object, they may serve the owner with written notice to discontinue the addition, and so long as he continues it after that notice the offence continues, and he is liable to an information. The words of the section are wide enough to cover, and are not inconsistent with, that construction, and I think it is strongly supported by the argument for the respondent based on the fact that the urban authority have no power to abate the inconvenience resulting from an offence under s. 156 by pulling down the addition to the house.

For the appellant, it was contended that the penalty could only attach if the urban authority interfered during the course of the work, and the owner continued it after notice to discontinue. That construction would not, it seems to me, give power to inflict a penalty in any degree commensurate with the offence committed against the town by permanently spoiling the line of the street. The penalty would be commensurate only with the offence committed in respect of the additional work done after notice to discontinue.

The judgments in *Marshall* v. *Smith* (1) must be read "Secundum subjectam materiam." Keating, J., said that he should be disposed to give any reasonable latitude of construction to the by-law if he saw any real difficulty in otherwise carrying out the Act. The difficulty arises here because the urban authority has no power to pull down the addition. Honyman, J., said that if the provision as to continuing penalties had followed immediately after the by-law with respect to party walls there would have been a difficulty in construing it. Here, as I have said, the provision as to penalties is part of the section creating the offence. I think there are substantial and valid distinctions of fact between *Marshall* v. *Smith* (1) and the present case, and that the reasons

(1) Law Rep. 8 C. P. 416.

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assigned for the judgment of the Court in that case do not apply in the present.

I think that *Coggins* v. *Bennett* (1) has no application. The act of encroachment was the only "terminus a quo" for the period of limitation in that case, and there was no statutory imposition of a penalty for continuing the encroachment.

I am therefore of opinion that the information was laid in time, and that the respondent is entitled to judgment.

HUDDLESTON, B. I am of the same opinion. I agree that, as the section imposes a penalty for a criminal offence, the appellant is entitled to the benefit of any doubt which may arise on the construction of it. It is said that by s. 252 the information should have been laid within six months from the time when the matter of the information arose; that the offence was the bringing forward of the appellant's house beyond the line of the street; that the offence was committed when the addition was completed, and that the matter of the information arose then.

It may be that the offence specified in the first clause of s. 156 was committed as soon as it became apparent that the appellant was bringing forward his house beyond the line of the street. But in substance the offence for which he was liable to the penalty was the continuing the addition after written notice from the urban authority. It is possible that for the offence specified in the first clause the appellant would have been liable to an indictment, but the following clause provides what the penalty shall be, not for building the addition, but for continuing it after notice. I think the meaning of the section is clear: It was thought necessary to secure uniformity with respect to the line of buildings in streets; it is therefore enacted that houses shall not be brought forward without the consent of the urban authority, but if a person chooses to bring his house forward without that consent, and the urban authority give him the written notice specified in the section, he is liable to a penalty not exceeding 40*s.* for every day during which the offence against the uniformity of the street is continued.

I do not feel myself fettered by the decision in *Marshall* v.

(1) 2 C. P. D. 568.

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Smith (1), which case differs considerably from the present. The decision was upon a by-law, not upon an Act of Parliament. It is obvious that the judgment of the Court was influenced by the fact that there were a number of by-laws, each of them specifying different offences, and a general subsequent by-law covering those of the preceding ones to which it applied. Keating, J., thought that the offence under the by-law with respect to party walls was not a continuing one, and therefore that the general by-law did not apply to it. The corporation there had power to make by-laws enabling them to pull down the party wall, so that there remained a remedy to them beyond the penalty. Here there is no such power; the penalty is imposed not in respect of the offence but in respect of the continuing it, and the penalty clause is part of the same section which declares the offence. I should feel but little difficulty in the decision of this case had it not been for *Marshall* v. *Smith*. (1) But for the reasons I have given I think that case distinguishable.

Judgment for the respondent.

Solicitors for appellant: *Layton & Jaques.*
Solicitors for respondent: *Coles & Cave, Eastbourne.*

W. A.

THE QUEEN *v.* THE JUDGE OF THE CITY OF LONDON COURT, AND ANOTHER.

April 3.

*Court of Admiralty—Jurisdiction—Waters not part of High Seas—Docks—County Court—*3 & 4 *Vict. c.* 65, *s.* 6—*The Admiralty Court Act,* 1861 (24 *Vict. c.* 10), *s.* 7.

A collision occurred in a dock connected with the river Thames by channels provided with gates and locks. An action was brought in a County Court having Admiralty jurisdiction in respect of damages arising out of the collision. On an application for a prohibition:—

Held, that the claim was within the Admiralty Court Act, 1861, s. 7, and that the County Court had jurisdiction.

RULE calling on the Judge of the City of London Court, and Henry Covington, to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in an action

(1) Law Rep. 8 C. P. 416.

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in which Henry Covington was plaintiff, and the London and Saint Katherine Docks Company were defendants.

It appeared from an affidavit filed on behalf of the docks company that the action was under the Admiralty jurisdiction of the City of London Court for damages for an alleged injury to a barge of the plaintiff's from a collision in the basin of the Royal Albert Dock. This dock was constructed on land of the company under power conferred by the London and Saint Katherine Docks Company Act, 1875 (38 & 39 Vict. c. cliii.), and communicated with the river Thames by artificial channels provided with gates and locks, by which the water in the dock was kept at or about the level of high tide. The dock was described in the affidavit as not within the flow and reflow of the tide. Objection was taken at the hearing to the jurisdiction of the City of London Court under these circumstances, but the objection was overruled.

Feb. 27. *A. G. Nelson* (*Myburgh, Q.C.*, with him), shewed cause.

Albert Gray (*Finlay Q.C.*, with him), in support of the rule.

Cur. adv. vult.

April 3. The judgment of the Court (Field, J., Huddleston, B., and Bowen, J.) was delivered by :—

HUDDLESTON, J. This is a rule for a prohibition to the City of London Court to restrain that Court and the plaintiff from proceeding with an action, instituted there by Henry Covington against the Saint Katherine Docks Company, to recover damages sustained by collision in the basin of the Royal Albert Dock of the company.

This basin is a portion of an extension dock made by the company under the powers of the London and Saint Katherine Docks Company Act, 1875, and is connected at either end by water ways and basins with the river Thames, the object being of course to afford additional dock accommodation, and adequate berths for ships arriving in the Port of London, of which those docks are expressly declared to form part. The company have also power by their Act to take and divert water from the Thames into and through the docks, and the powers of the com-

pany's harbour master extend for 300 yards in every direction into the Thames from the centre of the outer lock gates.

The ground on which the prohibition was sought, was that the City of London Court (which is one of the county courts to which an Admiralty jurisdiction has been assigned under 31 & 32 Vict. c. 71), has no jurisdiction to entertain a claim for collision in such a place as this inland basin, it not being any part of the high seas over which alone it is said the Court of Admiralty has jurisdiction.

It was not denied that if the Admiralty Court has jurisdiction the county court has it also, and the question, therefore, in the present case is limited to the true construction of the Admiralty Courts Acts, 3 & 4 Vict. c. 65, s. 6, and 24 Vict. c. 10, s. 7.

It is undoubted that before the passing of the Act, 3 & 4 Vict. c. 65, the Court of Admiralty had no jurisdiction over any place within the body of a county such as this, but that Act was expressly passed to get rid of that restriction, and to extend the jurisdiction of the Court to places within the body of a county, and by s. 6 it was accordingly provided that the Court should have jurisdiction to decide all claims for damage received to any ship or seagoing vessel, whether at the time within the body of a county or upon the high seas. It is unnecessary to consider whether this Act did more than remove that particular restriction, because the extension of the jurisdiction of the Court was carried still further by 24 Vict. c. 10, by which among other provisions it is enacted in s. 7 that "the Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," a ship being defined to be a vessel used in navigation not propelled by oars.

Now the cause of action in the present case falls clearly within the language of the section, and it seems to us that the facts bring it also within its spirit and object. First as to language, the legislation is in the most general possible terms "any claim for damage" without limitation of where done. Then as to the spirit and object of the Act, the Court of Admiralty had previously clear jurisdiction to entertain a claim for any damage caused by a ship in the Thames, and surely the basin and waterway of a dock are in effect merely a prolongation of the river for the purpose of giving proper accommodation to shipping, which must otherwise have had to discharge or load in the river.

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We can see no reason why if the harbour master is guilty of any neglect by which damage occurs in the 300 yards of the Thames which is within his limit, he shall be liable to an action in the Court of Admiralty, and why if the same thing occurs inside the outer gates he shall not. The thing causing the damage is a ship, she is water- rne and all the principles upon which the present case would be decided are identical with those which would govern a case of collision in the Thames.

It was, however, urged that if the words are to be read in their ordinary sense the section would include ships in all inland waters and even a ship in a graving dock, or whilst in the builder's yard, and there is always, when the legislature use such general language, a difficulty in drawing the precise line at which a particular case shall be ruled within the enactment, and another shall be ruled out of it. All we have to do, however, is to decide this present case, and on principle this case seems to come within the Act.

Authority also supports this contention. The object and effect of the Act has been declared to be to confer upon the Court of Admiralty the utmost jurisdiction in cases of collision. This is the language of Doctor Lushington, and his exposition of the statute was expressly approved of by the Privy Council: *The Malvina.* (1) This language was again repeated by Doctor Lushington in the case of *The Diana* (2), in which he held that the Court had jurisdiction under 24 Vict. c. 10, to entertain a claim for collision which had happened in the Great North of Holland Canal, i.e., in foreign inland waters.

In principle this last case appears to us undistinguishable from the present, and we think, therefore, that the City of London Court has the jurisdiction it claims and that the rule must be discharged with costs.

Rule discharged.

Solicitor for plaintiff: *W. M. Hacon.*
Solicitors for defendants: *Lowless & Co.*

(1) Lush. 493; on appeal, Brown. & Lush. 57. (2) Lush. 539.

A. M.

CASTELLAIN *v.* PRESTON AND OTHERS. 1882 *April* 4.

Fire Insurance—Vendor and Purchaser—Insurance by Vendor—Fire after Contract but before Completion—Right to Insurance Moneys—Subrogation.

A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor with the plaintiffs, an insurance company, against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance money from the plaintiffs:—

Held, by Chitty, J., in an action by the plaintiffs against the vendor, that the plaintiffs were not entitled to recover back the insurance money from the vendor, either for their own benefit or as trustees for the purchaser.

On payment of the moneys secured by a policy of fire insurance, the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties whereby the insured can compel such third parties to make good the loss insured against; but where such right of subrogation is claimed under a contract between the insured and third parties, the contract must be one relating solely to the subject-matter of the insurance, and must be moreover one which subsists at the time when the claim under the policy has matured.

Reversed by C.A. 11 Q.B.D. 190 C.A.

By an agreement dated the 21st of July, 1878, and made between the defendants of the one part, and Edward Rayner and John Edward Rayner, hereinafter called the purchasers of the other part, the defendants agreed to sell to the purchasers a piece of land situate in Suffolk Street, Liverpool, with a house and workshops erected thereon, for the sum of 3100*l.*

The sum of 155*l.*, part of the purchase-money, was paid upon the signing of the agreement, and the 6th of May, 1879, was the day named for payment of the remainder of the purchase-money, and the completion of the contract.

Prior to and at the date of the agreement, the buildings and premises were insured by the defendants, the owners and vendors, against loss or damage by fire, with the Liverpool and London and Globe Insurance Company, of which the plaintiff Edward Castellain is chairman, but the agreement contained no reference to this insurance.

Shortly after the date of the agreement, namely, on the 16th of August, 1878, before the date named for completion, a fire occurred by which the premises comprised in the agreement and

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insurance sustained damage to the amount of 330*l.* or thereabouts, and on the 25th of September, 1878, the insurance company paid to the defendants the sum of 330*l.* in payment of the damage occasioned by the fire.

At the time of the payment by the insurance company to the defendants, the insurance company had not been informed by the defendants or by any one of the agreement of the 31st of July, 1878.

In consequence of the vendors (the defendants) refusing to hand over the money to the purchasers or to expend it in reinstating the premises, the purchasers brought an action in the Chancery Division against the vendors claiming a declaration that they the purchasers were entitled to the benefit of the moneys received by the defendants from the insurance company, and to have such moneys paid or allowed to them accordingly, or otherwise to have them laid out towards reinstating the premises. That action was heard before the Master of the Rolls in April, 1880, and was dismissed with costs: *Rayner* v. *Preston* (1), and this decision was afterwards affirmed by the Court of Appeal (2), but a doubt was expressed by Brett and Cotton, L.JJ., whether as between the defendants and the company the defendants could keep the money.

The purchasers completed their purchase on the 12th of December, 1879, and paid to the defendants the sum of 2945*l.*, being the balance of the purchase-money.

In consequence of the doubt expressed by Brett and Cotton, L.JJ., as stated above, this action was commenced in the Queen's Bench Division of the Liverpool District Registry by the company against the vendors, claiming the sum of 330*l.* and interest from the 25th of September, 1878, or in the alternative a declaration that the defendants were trustees for the company of the same sum and interest.

The action was set down for trial before a judge at the Liverpool Winter Assize, 1882, but on being called on was adjourned to be heard before Chitty, J., in London, and came on before him sitting at the Rolls House, Chancery Lane.

(1) 14 Ch. D. 297. (2) 18 Ch. D. 1.

March 22nd. *Charles Russell, Q.C.*, and *Tobin*, for the plaintiff. *Gully, Q.C.* and *Kennedy*, for the defendants.

The arguments sufficiently appear from the judgment.

The following authorities were cited or referred to in the course of the argument: *Darrell* v. *Tibbitts* (1); *Collingridge* v. *Royal Exchange Assurance Corporation* (2); *Dalby* v. *India and London Life Assurance Co.* (3); *Simpson* v. *Thompson* (4); *Burnand* v. *Rodocanachi* (5); *Lohre* v. *Aitchison* (6); *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (7); *Ætna Fire Insurance Co.* v. *Tyler* (8); *King* v. *State Mutual Fire Insurance Co.* (9); *Suffolk Insurance Co.* v. *Boyden* (10); *Robert* v. *Traders Insurance Co.* (11); *Humphrey* v. *Arabin* (12); *Law* v. *London Indisputable Life Policy Co.* (13); Phillips on Insurance, 5th ed. vol. ii. pp. 384, 385; Arnould on Marine Insurance, and Bunyon on Fire Insurance.

Cur. adv. vult.

April 4th. CHITTY, J. This case raises an important question in the law of fire insurance. The plaintiff sues on behalf of the London, Liverpool, and Globe Insurance Company, and seeks to recover in the action a sum of 330*l.* with interest since the 25th of September, 1878. On the 25th of March, 1878, the defendants, as owners of certain lands and buildings in Liverpool, effected an insurance on the buildings against loss by fire, and they kept the policy on foot by payment of the premiums until after the fire occurred. The policy is in the usual form, giving the insurers the option of reinstating the property.

Some other clauses were referred to, but I do not think it material to mention them now. On the 31st of July, 1878, the defendants, who were in fact trustees, contracted to sell the land and buildings to their tenants, Messrs. Rayner, for a sum far

(1) 5 Q. B. D. 560.
(2) 3 Q. B. D. 173.
(3) 15 C. B. 365; 24 L. J. (C.P.) 2.
(4) 3 App. Cas. 279.
(5) 6 Q. B. D. 633.
(6) 4 App. Cas. 755.
(7) 5 Ch. D. 569.
(8) 16 Wend. N. Y. 385.
(9) 7 Cush. Mass. 1.
(10) 9 All. Mass. 123.
(11) 17 Wend. N. Y. 631.
(12) 2 *Lloyd & G.* Ir. Ch. temp. Plunket, 318.
(13) 24 L. J. (Ch.) 196.

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exceeding the amount of the insurance, and they received a deposit. The contract provided that the time of the completion should be such day within two years from the date as the vendors should name. On the 15th of August in the same year the fire occurred damaging part of the buildings. The claim was made on the part of the insured, and after negotiation as to the sum to be paid, the amount of the claim was ultimately fixed at 330*l.*, and that sum was in fact paid on the 25th of September, 1878, by the insurers who were at that time ignorant of the existence of the contract for sale. On the 25th of March, 1879, the defendants named the 5th of May as the day of completion, and on the following 12th of December the conveyance was executed and the balance of the purchase-money paid. I pause here for a moment to say that the circumstance that the insurers were ignorant of the existence of the contract for sale is immaterial. It is clear that the vendors could have recovered notwithstanding the contract for sale. That point was decided in *Collingridge* v. *Royal Exchange Assurance Corporation* (1), where a suggestion was made by the learned judges who decided it that in such circumstances the vendors might be trustees of the amount recovered for the purchasers: acting possibly on that suggestion, the purchasers brought their action in the Chancery Division against the present defendants seeking to obtain the benefit of the insurance, and it was held by the Master of the Rolls and by the majority of the Court of Appeal that the purchasers were not entitled as against the vendors to the benefit of the insurance, either by way of abatement of the purchase-money or reinstatement of the premises, but a doubt was intimated by the Master of the Rolls and by the Lords Justices Cotton and Brett, who formed the majority of the Court of Appeal, whether the insurance company could not compel the vendors to refund the money they had paid. That question now comes before me in this action for decision. There is no English authority directly in point, and the question must be decided on principle.

The plaintiffs contend that the contract of insurance is merely a contract of indemnity, and unless they recover in this action the defendants will receive double satisfaction. Undoubtedly it

(1) 3 Q. B. D. 173.

is settled law that a contract of insurance is a contract of indemnity. The principle of subrogation applies to fire insurance whether the subject-matter of the insured be chattels or buildings annexed to the soil. The law on the subject is ably stated in the judgments of the Master of the Rolls and of Mellish, L.J., in the case of *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1), and also by Lord Cairns in the case of *Simpson* v. *Thomson* (2), where he says at page 284 of the report: "I know of no foundation for the right of underwriters, except the well-known principle of law, where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against. Familiar instances may be put. Where the owner of a building insures, and the building is destroyed by a riot, the insurers on payment are subrogated to their right against the hundred. Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office on payment in like manner succeeds to the right of the landlord against his tenant. The same law applies in the case of mortgagee or mortgagor where the mortgagor is under an obligation to keep the buildings in repair.

11 Q B D 390

In marine insurance there are the familiar instances of capture and recapture and of reprisals, as in *Randal* v. *Cockran* (3), but a limit was marked in those cases by the decision in *Bernand* v. *Rodocanachi*. (4) There the underwriters under a valued policy of the ship, which was destroyed by the *Alabama* cruiser, paid as on a total loss. The American Government under a treaty with the British Government provided a fund out of which the insured received a sum in respect of the destruction of the ship, and the question was whether that sum was part of the salvage. That

(1) 5 Ch. D. 569.
(2) 3 App. Cas. 279.
(3) 1 Ves. Sen. 98.
(4) 6 Q. B. D. 633.

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point was put very clearly by Bramwell, L.J., in his judgment, and it was held that it was not, that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him. As I say that case marks the limit.

11 QBD 391

An obvious distinction exists between the case of marine insurance and of insurance of buildings annexed to the soil. In the case of marine insurance where there is a total constructive loss, the thing is considered as abandoned to the underwriters, and as vesting the property directly in them. But this doctrine of abandonment cannot be applied to the insurance of buildings annexed to the soil, although the buildings annexed are destroyed there cannot be a cession of the right to the soil itself.

11 QBD 402

This, however, creates no new difficulty, and the principle of subrogation applies as in the case of a partial loss under an ordinary fire insurance for loss of goods, and the principle was applied by the Court of Appeal in *Darrell* v. *Tibbitts*. (1) This case was mainly relied on by the plaintiffs, and requires to be carefully examined. The facts are simple, the landlord insured, and had a covenant with his lessee under which the lessee was bound to rebuild or reinstate in the event of damage by fire. The lessee had his remedy over against the Brighton corporation, but that circumstance was immaterial and was so treated by the Court of Appeal. After the insurers had paid the landlord for his loss the tenant repaired, and the question was whether the insurers were entitled to recover the amount they had paid. The Court held that they were. The case when examined turns out to be one of subrogation. If the lessee had not repaired, the insurers would undoubtedly on payment have on that principle been entitled to bring an action on the lessee's covenant, which related to the subject-matter of the insurance and its preservation. The only difference was one rather of form than of substance, arising from the circumstance that the landlord had, by reason of the reinstatement of the building, actually received for the loss the benefit of the covenant to repair, and consequently no right of action on the covenant remained. This difficulty the Court surmounted, the judges using various expressions in formulating

(1) 5 Q. B. D. 560.

technically the plaintiffs' right to recover, but all resulted in substance alike in the affirmation of the principle that the insurers were subrogated to the position of the insured in relation to the covenant to repair. I will refer to some passages in the judgments, with a view to make good that proposition. Brett, L.J., refers to the judgment in the case of *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1), and says, "that if the tenants had not repaired the damage, and had declined to do so, the insurance company would have been bound to pay the landlord who had insured with them, but would have had a right to bring in his name an action against the tenants, and recover from the tenants what they had paid to the landlord; in other words, a policy of fire insurance is a contract of indemnity similar to that which is contained in a policy of marine insurance. That case seems to me further to shew that if the landlord had sued the tenants before he received payment from the insurance company, he must have recovered from them, for it would have been no answer by the tenants that the landlord was insured. That case seems to me also to decide this, that if the landlord had recovered damages from the tenants equivalent to the injury done to him by the refusal of the tenants to repair, he could not afterwards sue the insurance company. The landlord was paid by the insurance company at a time when they could not resist his demand, as they were bound by their contract to pay." Then referring to damage and the liability of the corporation of Brighton, he says, "I think, however, that the case stands in the same position as if the tenants had executed the repairs with their own moneys." Then he says, "If the company cannot recover the money back, it follows that the landlord will have the whole extent of his loss as to the building made good by the tenants, and will also have the whole amount of that loss paid by the insurance company. If that is so, the whole doctrine of indemnity would be done away with: the landlord would be not merely indemnified, he would be paid twice over." Then he deals with the technical difficulties. "A technical difficulty arises in my mind as to the ground upon which the landlord can be held liable in this action, but it is a difficulty which ought to be

(1) 5 Ch. D. 569.

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surmounted." Then without reading through the rest of his judgment, he refers to various grounds on which he considers the plaintiffs might be entitled to recover the sum of money. He says in one part the Court had "a right to imply a promise on the part of the landlord to the insurance company at the time of payment by them, that if the loss should be afterwards made good by the tenants, he would repay the money which he had received from the insurance company." Then he refers to marine insurances, and says, "The doctrine is well established that where something is insured against loss, either in a marine or a fire policy, after the insured has been paid by the insurers for the loss, the insurers are put into the place of the insured with regard to every right given to him by the law respecting the subject-matter insured, and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against." I will not proceed to read further, but I take it the substance of these judgments is that the plaintiffs were in the particular case subrogated to the rights of the landlord against the tenant. Cotton, L.J., at the commencement of his judgment places the insurers in the position of a surety. It would be too long to read through all these judgments, but I will read towards the bottom of page 564 what the learned Lord Justice says, "Under these circumstances no doubt there is some difficulty in saying what is the ground upon which the money is to be obtained from the landlord. I do not think that technically the company have a right to recover back the money which they have paid, but they have a right to the benefit of what the insured has received." I will mark these words particularly, "in respect of a contract referring to the loss, by which he was entitled to receive compensation in damages, and which they might have called upon him to enforce for their benefit; when he has received that benefit, they can treat him as being under an obligation to use it as they may direct." Presently he speaks again of the contract relating to the loss. Thesiger, L.J., divides the case into the question of substance, and the question of form, and his judgment is very much to the same effect, although the expressions which he uses are somewhat

different. He says, at page 567, that he is "by no means prepared to say that there may not be some contracts so entirely independent of the subject-matter of the insurance as to put the insured in the position of being more than indemnified in the event of a loss." Then when he deals with the question of form he uses, as I have already said, various modes of expression in order to surmount and get over the technical difficulty which pressed upon him.

In the present case I am asked to go far beyond the principle of that decision. It is admitted on the part of the plaintiffs that the principle of subrogation cannot apply here. It was felt impossible to contend that the insurers on payment of the loss were entitled to bring, either in their own names or in the names of the vendors, the defendants, an action to enforce the contract of sale, or even to compel the vendors to complete. The contract of sale was not a contract, either directly or indirectly, for the preservation of the buildings insured. The contract of insurance was a collateral contract, wholly distinct from and unaffected by the contract of sale. The attempt now made is to convert the insurance against loss by fire into an insurance of the solvency of the purchaser. The position of the vendors in equity at the time when the fire occurred was this, they had no right of action against the purchasers at the time, but on giving notice fixing the day, they were entitled to recover the purchase-money after that day had passed, and the land and buildings in the meantime constituted their security under the doctrine of vendor's equitable lien for the payment of the purchase-money. Now the security was impaired by the fire. It was said that the purchase-money having been ultimately paid, the vendors in the result suffered no loss. I will try the proposition asserted by one or two illustrations which occur to me. Take the case of a landlord insuring, and the tenant under no obligation to repair, a case which I had before me the other day, where, under an informal agreement evidently drawn by the parties themselves, the large rent of 700*l.* was reserved, and the tenant notwithstanding the fire was bound to pay the rent. I stay here to say that a lease, as has been often held, is but a sale pro tanto. Now assume that the building in such a case was ruinous, and would last the length of the term

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only. Could the insurers recover a proportionate part of each payment of the rent as it was made, or could they wait until the end of the term, and then say in effect you have been paid for the whole value of the building, and therefore we can recover against you? Or to vary the case somewhat again, suppose the building at the end of the term was only half the value, could the insurers then recover half of the sum they had paid? I think not; I think all these questions must be answered in the negative, but if the plaintiffs are right in their contention, then the insurers could recover in all those cases.

Now, by way of further test, I will put two other cases which have actually occurred and been decided, and as I think rightly decided, in the American Courts. The first is the case of *King* v. *State Mutual Fire Insurance Co.* (1), decided in the Supreme Court, in 1851. The mortgagees there sought to recover the amount of the insurance from the insurer, and they claimed to be entitled to an assignment of the proportionate part of the mortgage debt, and it was held by the Supreme Court that the insurer was not bound to make any such assignment; the judgment of the Chief Justice contains a full and masterly exposition of the law on the subject. It is too long for me to quote at length, but there may be one or two passages which I may select. "The contract of insurance," he says, at p. 4, "with the mortgagees is not an insurance of the debt or of the payment of the debt; that would be an insurance of the solvency of the debtor; of course, as a contract of indemnity, it is not broken by the non-payment of the debt, or saved by its payment. It is not, strictly speaking, an insurance of the property in the sense of the liability for the loss of the property by fire to any one who may be the owner. It is rather a personal contract with the persons having a proprietary interest in it that the property shall sustain no loss by fire within the time expressed in the policy." At page 5, he says, "There is no privity of contract or of estate, in fact or in law, between the insurer and the mortgagor; but each has a separate and independent contract with the mortgagee. On what ground, then, can the money thus paid by the insurer to the mortgagee be claimed by the mortgagor? But if he cannot, it seems, à fortiori, that the insurer cannot

(1) 7 Cush. Mass. 1.

claim to charge his loss upon the mortgagor, which he would do if he were entitled to an assignment of the mortgage debt, either in full or pro tanto." At the bottom of the page he puts it thus: "So, if an owner insure his house, which is burnt within the time limited, if he has sold his house in the meantime, he has no legal claim to recover." He evidently means there that the house at the time when the loss has occurred has been not merely sold, but conveyed. At page 8, he says, "But it is said, and in this certainly lies the strength of the argument, that it would be inequitable for the mortgagee first to recover a total loss from the underwriters, and afterwards to recover the full amount of his debt from the mortgagor, to his own use. It would be, as it is said, to receive a double satisfaction. This is plausible, and requires consideration. Let us examine it. Is it a double satisfaction for the same thing, the same debt or duty? The case supposed is this, a man makes a loan of money, and takes a bond and mortgage for security. Say the loan is for ten years." That is an illustration that has occurred to me, and I think it is an excellent one. "He gets insurance on his own interest as mortgagee. At the expiration of seven years the buildings are burnt down; he claims and recovers on loss to the amount insured, being equal to the greater part of his debt. He afterwards receives the amount of his debt from the mortgagor and discharges his mortgage. Has he received a double satisfaction for one and the same debt? He surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt, there was no privity between the mortgagor and the underwriters; he had not contracted with them to pay it for him on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because they had bound themselves in the event which has happened to pay a certain sum to the mortgagee. But the mortgagee when he claims of the underwriters, does not claim the same debt. He claims a sum of money due to him upon a distinct and independent contract, upon a consideration, paid by himself, that upon a certain event, to wit, the burning of a particular house, they will pay him a sum of

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money expressed." Then at the bottom of page 9, he says, "What, then, is there inequitable on the part of the mortgagee towards either party in holding both sums? They are both due upon valid contracts with him made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received in money loaned, nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent." Then he mentions that the Court is aware that there were respectable authorities opposed to the view of the law that was taken, and he mentions particularly the case of *Tyler* v. *Ætna Insurance Co.* (1), and says that the judgment being that of the whole Court, and looking at the analogies and illustrations on which the reasoning of the learned Chancellor was founded, "it may be a question whether he has not relied too much on the cases of marine insurance in which the doctrine of constructive total loss, abandonment, and salvage are fully acknowledged, but which have slight application to insurances against loss by fire." Then, at the top of page 14, he says, "On a view of the whole question, the Court are of opinion that a mortgagee who gets insurance for himself when the insurance is general upon the property without limiting it in terms to his interest as mortgagee, but when, in point of fact, his only insurable interest is that of a mortgagee, in case of a loss by fire, before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use."

Now the position of the unpaid vendor in equity is analogous, although I will not say it is precisely the same, as the position of a mortgagee. The other American case is that of *Suffolk Fire Insurance Co.* v. *Boyden.* (2) In that case a bill in equity was filed, and it was held that if the interest of a mortgagee in possession has been insured eo nomine at his own expense, the insurers, in case of a loss by fire before the mortgage debt is paid, cannot, upon an offer to pay the loss and the amount due on the mortgage above the loss, maintain a bill in equity to have the mortgage assigned to them, and to be subrogated to the rights and remedies of the insured under the mortgage. It was said in

(1) 16 Wend. N. Y. 385. (2) 9 All. Mass. 123.

argument that in the case of *King* v. *State Mutual Fire Insurance Co.* (1) it was not necessary to decide the point to which the greater part of the judgment was devoted, and the case of *Suffolk Fire Insurance Co.* v. *Boyden* (2) was brought raising the point really for judgment, but the Court held that the principles which were laid down in the case of *King* v. *State Mutual Fire Insurance Co.* (1) were correctly laid down, and in substance adopted them. I think it unnecessary to read any portion of the judgment in that case, because in substance it proceeds upon identically the same principles as those of the former cases which I have already mentioned.

Now, I will put a case also by way of testing the principle which the plaintiff asserts. Supposing the mortgagor or the tenant is under no obligation to repair, and they repair voluntarily, according to the decision of *Burnand* v. *Rodocanachi* (3) that would be a gift on behalf of the mortgagor or the tenant to the landlord, and there would be no subrogation.

Well, the conclusion I arrive at is, that I should not be justified, either on principle or authority, in carrying the doctrine of subrogation beyond the limits which I have mentioned, and the short ground of my decision is, that the only principle applicable is that of subrogation as understood in the full sense of that term, and that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance which entitled the insurers to have the damages made good, and although this point is not necessary for my judgment, I think the contract should be one which subsists at the time when the claim under the policy of insurance has been matured.

11 QBD 392

There were certain minor points raised in the case by the pleadings of the defendants, but they were all very properly abandoned at the bar, and the case was argued on the substantial question which I have decided.

It was argued also that in this case the plaintiffs were seeking to recover for the benefit of the purchasers on an indemnity, but that, in any view of the case, would be wholly immaterial, because

(1) 7 Cush. Mass. 1. (2) 9 All. Mass. 123.
(3) 6 Q. B. D. 633.

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the plaintiffs were suing on their own rights, if any rights they had. In the same way it was said the defendants, being trustees, were bound to defend the action, but trustees who are defendants in defending an action defend it just in the same way as any other ordinary defendants.

The result, therefore, is, that I think the claim fails, and there must be judgment for the defendants.

Solicitors for plaintiffs: *Laces, Bird, Newton, & Richardson, Liverpool.*

Solicitors for defendants: *Anthony & Imlach, Liverpool.*

G. M.

April 4.

REECE, APPELLANT; MILLER AND OTHERS, RESPONDENTS.

Justices, Jurisdiction of, when ousted—Reasonable claim of Right—Fishing, Public Right of—Tidal navigable River—Tide, what constitutes—Damming back of Water by exceptionally High Tides.

An information was laid against the appellant for unlawfully fishing in a river wherein the respondents had a private right of fishery. It was proved that the river was navigable, and that at the place where the appellant fished the water was not salt, and that in ordinary tides it was unaffected by any tidal influence, but that upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water and caused it upon those occasions to rise and fall with the flow and ebb of the tide. The appellant contended that, the river being navigable and tidal at the place in question, there was a presumption that the public had a right to fish there, and that the jurisdiction of the justices was therefore ousted by a reasonable claim of right:—

Held, that the river at the place in question could not be considered as tidal within the meaning of the rule of law which gives the public a right to fish in navigable tidal rivers, and therefore there was no claim of title set up sufficient to oust the justices' jurisdiction.

CASE stated by justices under 20 & 21 Vict. c. 43, the facts of which were in substance as follows.

An information had been laid on behalf of the respondents, in which it was alleged that the appellant, on the 7th day of October, 1881, at Cadorey, in the county of Monmouth, did attempt to take fish in the river Wye, wherein the respondents had a private right of fishery (11 & 12 Vict. c. 43).

The case came on for hearing upon the 19th day of November, 1881, when the appellant appeared and admitted the act of fishing as alleged in the information, but alleged that the Wye was an

ancient navigable river, and also tidal at the spot in question, which facts, he alleged, raised a presumption that the public had a right to fish there, that he as one of the public claimed such right, and that this claim ousted the jurisdiction of the justices to hear the case.

On the part of the respondents it was contended, first, that the river Wye, although an ancient navigable river, was not at the spot in question tidal, and therefore the presumption referred to by the appellant did not arise; and secondly, that, even if it was tidal, in the face of the evidence they were ready to produce in support of their claim to a private fishery, the claim of the appellant was unreasonable, and not such a one as ought to oust the jurisdiction of the justices. The justices decided to hear the evidence on both points, and found as follows. With regard to the question whether the river was tidal or not at this spot, it was proved that the water was not salt there, and that in ordinary tides it was unaffected by any tidal influence, but that upon the occasion of very high tides the rising of the salt water in the lower parts of the river dammed back the fresh water and caused it upon those occasions to rise and fall with the flow and ebb of the Severn tide at the place in question, which rise and fall, and not the saltness of the water, constituted, the appellant contended, a tidal river. With regard to the title to a private fishery, it was shown that the respondents held it under a lease under seal granted by the Duke of Beaufort. It was also proved by evidence, partly documentary and partly oral, that the duke had received rent for the fishery from the year 1777 continuously down to the commencement of the respondents' tenancy. There were also produced a grant from the Crown in the reign of Edward VI., by which the manor of Trelleck with the fisheries attached, which included the fishery in question, was granted to William Herbert; proceedings on a quo warranto in the reign of Queen Elizabeth, by which the title of the then Earl of Pembroke under the grant aforesaid was inquired into and confirmed; a lease of the fishery granted in 1804 by the Duke of Beaufort to Edward Lucas; and two certificates granted by the Fishery Commissioners in 1868, by which the right of the Duke of Beaufort to maintain various fixed engines in the fishery was established.

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Evidence was given by a witness eighty-one years of age that he had fished the waters nearly all his life without making any payment to any one.

The justices convicted the appellant, and fined him five shillings with costs.

The question for the Court was, whether the claim of right set up by the appellant was sufficient to oust the jurisdiction of the justices.

Cripps, for the appellant. It is admitted that the river at the spot in question is navigable. The question whether the part of the river in which the right of fishery is claimed is tidal or not does not depend on the saltness of the water: *Rex* v. *Smith*. (1) It is contended that the right of the public to fish extends to every place within the influence of the tide, whether at ordinary or extraordinary tides: *Horne* v. *McKenzie*. (2) But the question is not whether there actually is such a right. In order to oust the jurisdiction of the justices, it is sufficient that there should be a reasonable claim of such a right: *Hargreaves* v. *Diddams* (3); *Hudson* v. *Macrae*. (4) No case has decided that a river is only tidal for this purpose up to the limit of ordinary tides. It was not for the magistrates to take upon themselves to decide a question such as this. The evidence given as to the existence of a private fishery cannot affect the question. If a primâ facie reasonable claim is shown on the part of the public, the magistrates cannot go into the question of any conflicting right. Such an inquiry might involve difficult points of title, for instance the construction of ancient charters, which are precisely the matters which the magistrates are not qualified to determine. [He also cited *Reg.* v. *Stimpson* (5), and *Reg.* v. *Burrow*. (6)]

Reid, for the respondents. Assuming that this was a tidal navigable river, the Crown might have granted an exclusive private right of fishery, and it is contended that the evidence of the private right was so overwhelming that no claim on the part of the public could be reasonable. The fact, that the only evidence

(1) 2 Doug. 441.
(2) 6 Cl. & F. 628.
(3) Law Rep. 10 Q. B. 582.
(4) 4 B. & S. 585.
(5) 4 B. & S. 301.
(6) 34 J. P. 53.

of user on the part of the public was that one solitary individual had fished without paying, shews the claim to be unreasonable. Secondly, the evidence shews that the river was not tidal at the spot in question within the legal doctrine on this subject. The authorities show that the origin of the public right of fishing was the right of the Crown to the soil of arms of the sea and tidal rivers, and the public right was originally co-extensive with such right of the Crown. The right of the Crown clearly would not apply to a part of the river affected by the tide only under extraordinary and exceptional circumstances, as described in the present case: Hale, de Jure Maris; Hargrave's Law Tracts, c. 5 and 6. [He also cited Jerwood on the Sea Shore, 60; the case of the *Bann* (1); *Malcolmson* v. *O'Dea*. (2)]

Cripps, in reply.

GROVE, J. I am of opinion that there was not in the present case any such reasonable claim of right as to oust the jurisdiction of the magistrates. The appellant claimed to fish as one of the public, and could only so claim on the ground that the water in which he was fishing was a tidal navigable river. The only evidence of any exercise of the right claimed on the part of the public was given by a witness eighty-one years of age, who had fished without making any payment to any one. There is no evidence under what circumstances he fished, and the evidence of the exercise of this right is so slight as to come to nothing. The evidence as to the character of the river Wye at the spot in question was that the water was not salt there, and that in ordinary tides it was unaffected by any tidal influence, but that upon the occasion of very high tides the rising of the salt water in the lower parts of the river dammed back the fresh water, and caused it upon those occasions to rise and fall with the flow and ebb of the tide. The question what constitutes a tidal navigable river has been discussed in various cases, and in my judgment a river is not rendered tidal, for this purpose, at the place in question by the fact that it may be affected by the tide as described in this case on the occasion of unusually high tides, when the action of the tide is reinforced by a strong wind, or some such excep-

(1) Davis, 55. (2) 10 H. L. 593.

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tional circumstance causes the tide to rise unusually high. In order that the river may be tidal at the spot in question it may not be necessary that the water should be salt, but it seems to me that the spot must be one where the tide in the ordinary and regular course of things flows and reflows. There is no case which shews that, because at exceptionally high tides some portion of the river is dammed up and prevented from flowing down and so rises and falls with the tide, that portion of the river can be called tidal. It is unnecessary to go through all the authorities on the subject. In Hale, de Jure Maris; Hargrave's Law Tracts 12, the public right of fishing in rivers is treated of in connection with the king's interest in arms of the sea. There seems strong ground, from the whole of the passage, for thinking that the public right of fishing was considered by the author as coextensive with the right of the Crown over the river for public purposes. Lord Hale, C.J., there says: "Herein there will be these things examinable; 1st. What shall be said the shore or littus maris; 2nd. What shall be said an arm or creek of the sea . . . . For the first of these, it is certain that that which the sea overflows either at high spring tides or at extraordinary tides comes not as to this purpose under the denomination littus maris, and consequently the king's title is not of that large extent, but to land that is usually overflowed at ordinary tides . . . . For the second, that is called an arm of the sea where the sea flows and reflows; so that the river of Thames above Kingston, and the river of Severn above Tewkesbury, though they are public rivers are not arms of the sea. But it seems that although the water be fresh at high water yet the denomination of an arm of the sea continues if it flow and reflow as in Thames above the bridge."

In the present case there is no regular flow and reflow of the tide at the spot in question, but only an occasional damming back of the water. The law on the subject of the right of the public to fish in rivers is laid down in the case of *Mussett* v. *Burch* (1), by Cleasby, B. He says, "The case in the Irish reports, *Murphy* v. *Ryan* (2), is decisive on the point before us. It expressly decides that the public cannot acquire by immemorial

(1) 35 L. T. (N.S.) 486. (2) Ir. Rep. 2 C. L. 143.

usage any right of fishing in a river in which though it be navigable the tide does not ebb and flow."

For this purpose, as I have already said, it seems to me that "tidal navigable river" means that part of the river which under ordinary circumstances is tidal and navigable as such, and it is not enough to shew that sometimes under unusual circumstances the river at the place in question is affected by the tide. For the purposes of the right claimed, the place must be one which may be fairly said to be within the influence of the ebb and flow of the tides in the ordinary course of things. It does not seem to me reasonable that, in every part of a river which may be affected by exceptionally high tides, and in which the water may be occasionally to some extent backed up in consequence, there should be a public right of fishing. For these reasons I do not think that in the present case any reasonable claim to a public right of fishing was made out. That being so, *Hargreaves* v. *Diddams* (1), and *Hudson* v. *Macrae* (2), are authorities to shew that the jurisdiction of the justices was not ousted. It may be observed that the evidence of a private right of fishing was very strong, though, if the appellant had made out a good primâ facie title to fish as one of the public, it might not perhaps be competent to us to consider that. It does, however, seem material as negativing any exercise by the public of the supposed right set up by the appellant. For these reasons I am of opinion that the conviction was right.

STEPHEN, J. I am of the same opinion. The whole question comes ultimately into a very narrow compass. The only claim set up is one of a right on the part of the public to fish in a navigable tidal river. The fact that the flow of water is affected as described under peculiar and exceptional circumstances is not in my opinion sufficient to make this a tidal river within the meaning of the authorities on this subject. The case of *Horne* v. *McKenzie* (3), has been relied on by the appellant, but the question there was quite different from that in the present case. The question there was not what constitutes a tide, but what for

(1) Law Rep. 10 Q. B. 582. (2) 4 B. & S. 585.
(3) 6 Cl. & F. 628.

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the purposes of salmon fishery Acts was to be considered river, and what sea. The case of *Reg.* v. *Burrow* (1), which has been cited, was also quite different from the present, inasmuch as it related to a lake, and the claim was made by the occupier of a certain cottage who claimed in respect of such occupation, and not as one of the public. I think the conviction should be affirmed.

Conviction affirmed.

Solicitors for appellant: *Saunders, Hawksford, & Bennett.*

Solicitors for respondents: *Roberts & Barlow,* for *James & Bodenham.*

E. L.

April 4.

THE SHEFFIELD WATERWORKS CO., APPELLANTS; CARTER, RESPONDENT.

BROOKS, APPELLANT: THE SHEFFIELD WATERWORKS CO., RESPONDENTS.

THE SHEFFIELD WATERWORKS CO., APPELLANTS; BROOKS, RESPONDENT.

Waterworks Company—Supply of Water by Measurement—Meter, Obligation to provide—Cutting off Supply—Waterworks Clauses Act, 1863 (26 *&* 27 *Vict. c.* 93), *ss.* 14, 16—*Waterworks Clauses Act,* 1847 (10 *Vict. c.* 17), *ss.* 43, 74—*Failure to pay or tender Rate in Advance.*

The special Act of a water company provided for the supply of water to the inhabitants of the district for "family use" at certain rates calculated on the rental of the house supplied. The Act contained further provisions for the supply of water for schools, manufactories, &c., &c., and for other purposes than family consumption, and for baths, &c., and for the purposes of any trade or business whatsoever at certain rates per thousand gallons. The supply of water under these latter provisions having been held obligatory upon the company unless prevented by causes beyond their control:—

Held, that, there being no provision in the special Act throwing upon the consumer the obligation of providing a meter to measure the water supplied for the purposes of a bath, no such obligation could be implied from the 14th section of the Waterworks Clauses Act, 1863, incorporated with the special Act, which section provides that where the undertakers are authorized by the special Act to supply water by measure they may let for hire to any consumer of water so supplied any meter or instrument for measuring the quantity of water supplied.

The occupier of a house within the district of the above-mentioned company had a bath connected by means of a pipe with the house cistern, to which water

(1) 34 J. P. 53.

was conveyed from the company's mains for "family use." The company required him to put up a meter for the purpose of measuring the water used for the bath, but he refused to do so. He had paid to the company in advance the proper amount in respect of the water supply for "family use" for the quarter ending the 29th of September, but had not paid or tendered any sum in respect of the water supply to the bath during such period. The company in consequence of his refusal to put up a meter or disconnect the bath cut off the communication pipe from their main to his house upon the 20th of September.

On the 29th of September, having cut off the pipe connecting the cistern with the bath, but not the waste or outlet pipe from the bath, he gave notice to the company of what he had done and paid to the company in advance the proper amount for the supply of water for "family use" during the ensuing quarter, but did not restore the communication pipe between the company's mains and his cistern. The company refused to restore the supply on the ground that he had not cut off the waste pipe from the bath, which he refused to do. The supply of water was not renewed till the 4th of November, when the company restored the communication pipe under protest:—

Held, that the company were not entitled to insist on the consumer's providing a meter, but that they were not liable to a penalty under the Waterworks Clauses Act, 1847, s. 43, for not supplying water during the period between the 20th and the 29th of September, inasmuch as no payment or tender in respect of the water supply to the bath for such period had been made.

But *held* that the company were liable to a penalty in respect of the period subsequent to the 29th of September: that they had no right to refuse the supply of water after that date, and that they were not justified in cutting off the supply, and were, therefore, not entitled to require the consumer to renew the communication.

CASES stated by the stipendiary magistrate for the borough of Sheffield, the facts of which were in substance as follows:

CARTER'S CASE.

A complaint had been made by the respondent against the appellants, the Sheffield Waterworks Company, under s. 43 of the Waterworks Clauses Act, 1847, 10 Vict. c. 17 (the Waterworks Clauses Acts being incorporated with the appellants' special Act), for neglecting to furnish the respondent with a supply of water for domestic purposes at a certain house in the borough for a period of thirty-four days, from the 26th of August, 1881, to the 29th of September, 1881. As a matter of fact the company did neglect to supply the respondent with water as alleged in consequence of a dispute which arose under the following circumstances. In the supply of water to the house was involved a supply of water for a bath within the 81st section of the Sheffield Water-

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works Act, 1853, and the dispute was caused by the directions in the said section as to furnishing such supply at and after certain rates according to the thousands of gallons supplied.

The respondent had been using a method by which he considered that he was ascertaining by actual measurement the quantity of water which was being supplied to his bath. He informed the company of what he was doing, and arrived at the conclusion that during the preceding twelve months the consumption of water in his bath had not been quite 2000 gallons. He considered that on the average the bath had been used as frequently during that period as in any previous year, but not more frequently; but he was willing to give the company the benefit of an extra thousand gallons per annum to cover any possible difference in quantity, and so put the twelve months' consumption at 3000 gallons instead of 2000. Under this view a sum of 17*s.* 3*d.* was the proper amount due in respect of the supply of water to his bath up to the 24th of June, 1881, which sum he accordingly tendered to the company. He further tendered on the 27th of September the sum of sixpence for water used in his bath between the 24th of June and the 26th of August.

The method the respondent adopted was as follows. He had a waterline painted round the sides of the bath at such a height as gave a measure of a shade under thirty-one gallons of water in the bath when filled to the bottom of the line, and a shade under thirty-two gallons when filled to the top of it. He further had a calendar for the current year hung up in the bath-room, and gave orders that when the bath was used it should never be filled higher than the waterline, and that the calendar should be marked at the day so as to shew that the bath had been used on it. By the marks on the calendar he arrived at his conclusion as to the number of times the bath was used, and then by allowing thirty-two gallons for each time he further came to his conclusion as to the quantity of water actually used.

The company, as a fact, claimed 6*l.* 15*s.* 5*d.* for the water supplied to the bath up to the 24th of June, 1881, but this amount was merely a calculation made on a scale graduated according to the rent of the house, and based upon an estimate of the average quantity required, which the company call their

estimate scale, and which some consumers have been willing to agree to in place of a rate by the thousands of gallons supplied, but which the respondent had not agreed to, and which only affects those who agree. The company also claimed a further sum reckoned on the estimate scale for the time after the 24th of June.

The view taken by the company was that they were willing to supply water for the bath on the terms of their above-named printed estimate scale, and that otherwise the supply of water for the bath must be taken by a meter, because the directors were advised that the company are, under their special Acts, and the Acts incorporated therewith, entitled to require and do require a meter to be used for ascertaining the quantity of water supplied for the purpose of the bath. Beyond this the company's view was that the meter might be either provided and fixed by the consumer, subject to the approval of the company, or that it might be provided by the company, who were willing so to provide it, and let to the consumer for hire.

The respondent contended that there was no obligation imposed on the consumer by the statutes relating to the subject to provide or pay for the providing of a meter. The magistrate convicted the company in a penalty.

The sole question for the Court in this case was whether the appellants were entitled to insist on meters and meters only being used by their consumers to measure the supply of water to their baths.

BROOKS' CASE.

In this case there were two complaints under s. 43 of the Waterworks Clauses Act, 1847, by Brooks against the company, the first being for the non-supply of water for domestic purposes and the use of his family, at a house in the borough of Sheffield, between the 20th and 29th of September, and the second for a similar non-supply between the 29th of September and the 4th of November, 1881.

It appeared that there was a communication pipe from the company's mains to a cistern in the house, from which came the water for purposes of ordinary family use within the 79th section

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of the Company's special Act of 1853. There were also in the house a water-closet and fixed bath supplied by pipes from the cistern. By the provisions of their special Act the company were entitled in respect of the water supplied for the family use of the complainant and the water-closet purposes, to the payment of 11*s.* 3*d.* per quarter. By the special Act water supplied for bath purposes was to be paid for by quantity at certain specified rates per thousand gallons. The company insisted on payment for the water supplied to the complainant's bath on the "estimate scale," already mentioned in Carter's Case, or upon measurement of the quantity by meter to be provided by him at his own expense, or let to him on hire by the company. The complainant declined to accept either of these alternatives, but on the 15th of September, 1881, he offered to pay the company the sum of 5*s.* per annum for the water to be supplied to his bath, which sum was, in his opinion, having regard to the price fixed by the company's Acts, a reasonable charge. On the same day he paid to the company the sum of 11*s.* 3*d.*, which was the proper sum to be paid to the company for the supply of water for the ordinary use of himself and family in his dwelling-house and the water-closet for the quarter ending the 29th of September, 1881; but he made no tender or payment in respect of any water to be supplied to or used in the bath during such quarter. On the 16th of September the company gave notice to complainant of their intention to cut off the communication pipe between the main and the cistern, and to stop the supply of water to the house unless the complainant either disconnected or stopped the pipe supplying the bath from the company's service, or adopted one of the alternative modes of payment for the bath water before-mentioned. No answer was received to this communication, and on the 20th of September the company did cut off the communication pipe and stop the water flowing into the house. It did not appear that there was any other mode by which the company could have prevented the water supplied by them to the house from flowing into the bath.

On the 24th of September the complainant severed the inlet pipe from the cistern to the bath, but did not close or shut up in any way the waste or outlet pipe at the bottom of the bath, and

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the bath could still be used if water was introduced into it otherwise than by means of the inlet pipe. The complainant did not give notice to the company that he had severed the inlet pipe until the 29th of September. On the 29th of September he gave them notice of what he had done on the 24th, and paid them 11*s.* 3*d.* in advance for the supply of water for family and water-closet purposes during the quarter ending the 24th of December, 1881, and gave them notice in writing that he required a supply of water for "domestic purposes" to his house. He did not reconnect or offer to reconnect or pay for the reconnection of the communication pipe so cut as aforesaid. On the same day he was asked by one of the company's servants to close up the waste or outlet pipe of the bath, but this he refused to do. On the 14th of October he was again asked to do so and refused. The company then tendered back to him the 11*s.* 3*d.* which he had paid on the 29th of September, but he refused to receive it. On the 4th of November the company restored the complainant's water supply, stating that they did so under protest and without prejudice to their legal rights. The magistrate dismissed the first complaint as to the period between 20th and 29th of September, on the ground that as up to the 24th of September the supply of bath water was mixed up with the supply for ordinary family use, and no payment or tender had been made in respect of that portion of the supply that consisted of bath water, the complainant could not proceed under the 43rd section of the Waterworks Clauses Act, 1847, which imposes a penalty for non-supply of water during the time for which the rates for water supply have been paid or tendered; and that as to the period between the 24th of September and 29th of September, the company not knowing that the bath had been disconnected, were in the same position as before, and were not liable for neglecting to supply water under the section. The magistrate convicted the company on the second complaint in a penalty, on the ground that the company were not entitled to cut off the communication pipe because complainant refused to provide a meter, and consequently the complainant was not bound to restore the communication pipe before he could claim a supply for the use of his family.

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The questions in this case were :—

1. Whether the company were justified in refusing to supply the complainant with water for his domestic use between the 20th and 29th days of September, 1881, and also on the 20th of September in cutting the pipe by or through which the water was supplied by them to him or for his use, and in stopping the water flowing into his premises, and whether the magistrate was right or wrong in disallowing his first complaint.

2. Whether the company were justified in refusing to supply the complainant with water for his domestic use on and after the 29th of September, 1881.

March 23. *Wills, Q.C.* (*Barker* and *Price,* with him), for the company. It is in the first place contended that the 81st section of the special Act does not render the supply of water for bath purposes compulsory. Under the Sheffield Waterworks Acts the supply of water for baths is not included in the provisions relating to the supply of water for the ordinary purposes of family use, the rate payable for which is regulated according to the rateable value of the premises; but in another set of provisions relating to the supply of water for various trade and other purposes in the case of which latter purposes the price of the water is to be regulated by measurement. It is contended that the true construction of the Act is that the supply for these purposes is to be matter of agreement and not compulsory. (1)

Secondly, it is contended that, assuming the supply to be compulsory, the consumer must himself provide or pay for the supply of a meter for the measurement of the water. The supply is to be by measurement, and the only practical mode of measurement is by meter. The mode of measurement adopted by the

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(1) The arguments on this point to a great extent turned upon and involved the discussion of a somewhat complicated series of provisions contained in the special Acts of the company read in connection with the Waterworks Clauses Acts. As it appears doubtful how far this branch of the case, turning as it does on the special statutes of a particular company, can afford a precedent for other cases, it has been deemed unnecessary to report the case on this point. Consequently the sections and the arguments upon them have not been set out. A summary, however, of these provisions, and the arguments based upon them, will be found in the judgment.

respondent in this case is obviously absurd, as affording no security for accurate measurement to the company. It amounts to a claim on the part of the consumer to measure for himself without the possibility of any check on the company's part. The case of a bath involves only a small quantity, but it must be remembered that the same rule of measurement as applies to baths must be applied to manufacturing purposes. There is no express provision either in the special Acts or the Waterworks Clauses Acts rendering it obligatory on either party to provide a meter in the case of water supplied by measurement. The answer to the question on whom the obligation rests may be gathered by implication from the necessities of the case and the provisions of the statutes. The company have no power to affix a meter on the consumer's premises. They have no power or control over the pipes when once the water has passed out of their main.

[He proceeded to argue that certain provisions of the special legislation with regard to the company gave rise to the necessary implication that the consumer was to pay for the meter.]

It follows also by necessary implication, from s. 14 of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), that the consumer is to supply or pay for the meter. That section provides that, when the undertakers are authorized by the special Act to supply water by measure, they may let for hire to any consumer of water so supplied any meter or instrument for measuring the quantity of water supplied and consumed, &c., for such remuneration in money as may be agreed upon by them and the consumer. This provision assumes that the consumer is to provide the meter, for no one would hire a meter if the company were bound to supply one.

If the company are entitled to insist on measurement by meter then they are not bound to supply water unless a meter is provided by the consumer, and the only way of protecting themselves in the event of a refusal by the consumer to provide a meter is by cutting off the supply.

Dodd, for the respondents, Carter and Brooks. The supply of water for bath purposes is rendered compulsory by the company's Acts. (1) There is no provision rendering it essential that

(1) See note, ante, p. 638.

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the measurement should be by meter, still less that the consumer should provide the meter. Primâ facie it is for the party supplying an article which is to be paid for by measure to provide for the measurement. That being so, if, as the magistrate decided, the mode of measurement adopted by the respondent Carter, though rough, was practically sufficiently accurate, there was no justification for the refusal in his case to supply the water. The provisions of s. 14 of the Waterworks Clauses Act, 1863, with regard to the hire of meters, cannot of themselves import an obligation on the consumer to provide a meter. The effect of the section is that if the consumer is bound, by the provisions of the special Act or otherwise, to provide the means of measurement, the company may supply and let the meter to him. There is no reason in the nature of things why this obligation should be thrown on the consumer rather than the company. It is for the company's benefit that the measurement takes place, and the company having a profitable monopoly it must be presumed that the legislature in fixing the price of the water included incidental expenses of this sort.

Assuming even that the consumer was bound to provide a meter for the water supplied to the bath, there is no power to cut off the supply of water for family use, for which he has paid, because he refuses to provide a meter for the water supplied to the bath. Still less can there be such power if he is not bound to provide means of measurement. The power to cut off the water is expressly given by the Waterworks Clauses Acts, and must be confined to the cases mentioned in the statute. The present case is not within those provisions. The power to cut off the water is given by the Waterworks Clauses Act, 1847, 10 Vict. c. 17, s. 46 (which clearly does not apply), and s. 74, and by the Waterworks Clauses Act, 1863, 26 & 27 Vict. c. 93, s. 16. The 74th section of the Waterworks Clauses Act, 1847, gives power to cut off the supply if the consumer neglects to pay the rate "at any of the said times of payment thereof." This clearly only applies to the rates mentioned in ss. 68 and 70, viz., the ordinary water-rate payable according to the annual value of the tenement, and payable quarterly in advance. It cannot apply to payments by measure for bath

water, which are not within those sections, and which depend on the amount consumed and cannot be payable in advance. The 16th section of the Waterworks Clauses Act, 1863, applies only to cases of waste, or misuse of water. Therefore in Brooks' case the company had no right to cut off the water. Consequently, the magistrate was right in convicting on the second complaint. The company, having wrongfully cut off the communication pipe, could not call on the complainant to restore the communication before supplying him again with water. Moreover, the company appear to have refused to supply water quite apart from the question of restoring the communication, because the outlet pipe from the bath was not removed, which clearly they had no right to do. The decision in *Sheffield Waterworks Co.* v. *Wilkinson* (1) is therefore inapplicable.

The magistrate ought also to have convicted on the first complaint. The obligation to pay or tender rates in advance as a condition precedent to the right of complaint for non-supply under Waterworks Clauses Act, 1847, s. 43, only applies with respect to the ordinary quarterly rates referred to in ss. 68 and 70, which are payable quarterly in advance, and not to payments by measurement, which are not made so payable and cannot be.

Wills, Q.C., in reply. Sect. 74 of Waterworks Clauses Act, 1847, gives power to cut off the supply if the rate is not paid, and by the interpretation clause, s. 3, "water rate" includes any rent, reward or payment to be made for a supply of water. Sect. 16 of the Waterworks Clauses Act, 1863, authorizes the company to cut off the supply if the consumer wrongfully fails to do anything which under the provisions of the special Act ought to be done for the prevention of the waste, misuse, or undue consumption of the water. If therefore it is correctly contended that a meter ought to be provided by the consumer, the company were entitled to cut off the water, that being their only possible mode of protecting themselves as long as Mr. Brooks kept open the pipe supplying the bath without proper means of measuring the water: *Sheffield Waterworks Co.* v. *Wilkinson* (1) is therefore in point.

Cur. adv. vult.

(1) 4 C. P. D. 410.

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April 4. The judgment of the Court, Mathew and Cave, JJ., was delivered by

CAVE, J. In the first of these cases we are asked whether the company are entitled to insist on meters, and meters only being used by their customers to measure the supply of water to their baths. For the company it was contended, first, that they are not bound to supply water for baths at all; and secondly, that if they are so bound, they are entitled to insist on meters being used by their customers. By 11 Geo. 4, c. lv., s. 93, it was enacted that "the company should be obliged in the manner thereinbefore directed to furnish such a sufficient supply of water so far as their means would allow to every inhabitant for the use of his or her own family at certain rates; and that in the case of persons requiring a supply of water for (among other purposes) baths, such supply should be furnished by the company in such cases at such rates as should be settled by and between the committee of management of the company and such persons respectively."

By 8 & 9 Vict. c. clxxv., s. 83, it was enacted that in the case of persons requiring a supply of water for (amongst other purposes) baths or closets, such supply should be furnished by the company at and after not exceeding the rate of one penny for every one hundred gallons so supplied as aforesaid. By s. 84 it was enacted that the company should not charge more in any one year than the rates thereinafter specified in respect of water-closets, in or belonging to any private dwelling-house: "Provided always that the company shall not be compelled to supply any water-closet not constructed in manner approved of by the company."

Under the first Act, the obligation to furnish a sufficient supply for ordinary use, which did not include baths, was limited by their means, but subject to that limitation the obligation to supply would appear to have been compulsory. The obligation, however, to supply water for baths, or closets, was in fact left to the discretion of the company by the provision that it was to be supplied at a rate to be settled by the company and the consumer. This last provision, however, was altered by the Act of 1845, which fixed the rate; and the proviso in s. 84 seems to lead to the inference that subject to the limitation as to means which

was repeated in s. 81 of the Act of 1845, the supply of water under s. 83, at the rate therein specified, was compulsory and not discretionary.

The preceding Acts were, however, repealed by an Act passed in 1853, which is still in force. By s. 79 of that Act it is enacted that "the company shall and they are hereby required to furnish a sufficient supply of water to every inhabitant for the use of his or her family," at certain rates, calculated on the rent of the house. By s. 81, "In cases of schools, manufactories, dyers, printers, bleachers, brewers, innkeepers, livery-stable keepers, alehouse keepers, and other persons requiring a supply of water for other purposes than his or her own family's consumption, or persons requiring a supply of water for baths, ponds, or pools, or closets, or for washing carriages, or for cows, or horses, or for the purposes of any trade, or business whatsoever, such supply shall be furnished by the said company in such cases at and after the following rates per thousand gallons."

Now looking at the purposes for which the water to be supplied under this section is required, and looking at the construction which must be put on the similar words of s. 83 of the Act of 1845, there seems every reason for putting upon the language of this section its natural construction, and for holding that the words "such supply shall be furnished by the company" impose on the company the obligation, and do not merely confer a discretionary power, of supplying water for those purposes. To hold that the words conferred a discretionary power would enable the company to supply certain manufactories, and refuse to supply others, and to decide arbitrarily what houses should and what should not have a supply of water for their water-closets. We can find no provision in the Act which favours the notion that the legislature intended to repose a discretion of this kind in the company.

Mr. Wills referred to the Waterworks Clauses Act of 1847 (10 & 11 Vict. c. 17), as shewing that the legislature contemplated a compulsory supply for domestic purposes only, and not for bath purposes; but as to this it is sufficient to point out that s. 43 imposes a penalty on the company for neglecting or refusing to furnish to any owner or occupier entitled under that or the

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special Act to receive a supply of water, which shews conclusively that the legislature contemplated the possibility of a supply being made compulsory by the special Act in addition to the supply for domestic purposes made compulsory by the general Act.

It was next contended that s. 74 of the General Act of 1847, which is the only section giving the company power to cut off the water if the rate is not paid, cannot apply to the sums payable for water supplied for bath purposes, and that therefore if the supply of water for baths is compulsory, there is no power to cut it off if the tenant refuses to pay. Sect. 74 is in these terms: "If any person supplied with water by the undertakers, or liable as herein or in the special Act provided to pay the water rate, neglect to pay such water rate at any of the said times of payment thereof the undertakers may stop the water," &c. It was argued that the expression "said times of payment" must refer to the preceding ss. 68 and 70, of which the former enacts that the rates shall be payable according to the annual value of the tenement supplied, and the latter requires that the rates shall be paid in advance by equal quarterly payments, and that it is inapplicable to payments by measure, which cannot be made in advance. But the interpretation clause (s. 3) provides that the expression "water rate" shall include any rent, reward, or payment to be made to the undertakers for a supply of water, and s. 74 expressly includes persons liable as in the special Act provided to pay the water rate as persons whose water may be cut off.

Lastly, it was asked, assuming the supply to be compulsory, what would happen if at any time the company had not enough water to supply all those who under s. 81 of the Act of 1853 might require a supply. The General Act of 1863, by s. 13, exempts the undertakers from penalties or damages for not supplying water under any agreement to supply it for other than domestic purposes, if the want of such supply arises from frost, unusual drought, or other unavoidable cause or accident. But this section is expressly limited to the case of water supplied under an agreement, and does not apply to water supplied compulsorily, and it was contended that it was unreasonable to hold the supply for baths to be compulsory, because in that case the company would be liable for the non-supply of water for bath

purposes where the non-supply had arisen from such causes as those above-mentioned. But the answer is that the company would not be liable under those circumstances. "When a party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract, but where the law creates a duty or charge and the party is disabled to perform it without any default in him and hath no remedy over, there the law will excuse him": *Paradine* v. *Jane*. (l) Moreover, s. 43 of the General Act of 1847, which fixes a penalty for the neglect or refusal to supply water, has an express exception in the case of frost, unusual drought, or other unavoidable cause, or accident, or during necessary repairs.

Then if the supply is compulsory, is there anything in the Company's Acts or in the General Acts to shew that the company are entitled to require as a condition precedent to the supply that the consumer shall put up at his own expense, or hire from the company, a meter for the purpose of measuring the water so supplied.

For the purpose of shewing that there is, Mr. Wills referred us to s. 97 of the Act of 1845, which, after reciting that the houses of the poor are in many cases not supplied with water on account of the inability of the owners or occupiers to lay down the communication pipes and other apparatus, requires the company under certain conditions to lay down such pipes and apparatus. It was suggested that the apparatus here referred to includes a meter, but it seems unlikely that in the class of houses referred to water was used in 1845 for baths, and it seems more natural to suppose that the word "apparatus" refers to cisterns to hold the supply, or to taps or cocks to regulate its admission and distribution.

Mr. Wills also referred to the Company's Act of 1860 and the General Act of 1863 (26 & 27 Vict. c. 93.) Sect. 12 of the former Act provides that if the company use or require to be used any meter for ascertaining the quantity of water to be supplied to any person for any purpose under the Act of 1853 or that Act, the council may appoint an inspector of meters; and s. 14 of the latter Act empowers the undertakers, when they are authorized by

(l) Aleyn, 26.

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the special Act to supply water by measure, to let meters for hire to any consumer for such remuneration in money as may be agreed upon between them and the consumer; but we think that these sections do not warrant us in inferring what we nowhere find expressed, viz., an obligation on the part of the consumer to put up a meter at his own expense or hire one from the company, as a condition precedent to his right to require a supply of water for a bath or water-closet.

These considerations enable us to answer the question put to us in Carter's case, which is, whether the company are entitled to insist on meters, and meters only, being used by their customers to measure the supply of water to their baths; and we are of opinion that this question must be answered in the negative, and consequently that the conviction must stand, and the appeal be dismissed with costs.

Brooks' case needs some further consideration. On the 15th of September, 1881, he required a supply of water, both for the ordinary use of himself and his family and for a water-closet and a bath, and paid the company 11*s.* 3*d.*, which was the proper sum to be paid for the supply of water for ordinary use and for the water-closet for the quarter ending the 29th of September, 1881, but he made no payment or tender in respect of the water to be supplied to or used in the bath during such quarter, and thereupon the company on the 20th of September cut off the water, and refused to supply any water for any purpose whatever.

Mr. Brooks on the 24th of September severed the connection between his cistern and his bath, allowing, however, the outlet pipe of his bath to remain, but gave the company no notice of what he had done until the 29th of September, when he paid the proper sum for the supply of water for the ordinary use of himself and his family and for the water-closet down to the 25th of December, 1881. The company, however, still refused to supply water, apparently on the ground that he had not also cut off the outlet pipe from his bath until the 4th of November, when they restored the communication under protest.

Some difficulty arises from the fact that s. 43 of the Act of 1847, which imposes the penalty on any neglect or refusal to supply water, appears to contemplate payment by a rate on the

value of the tenement only, and not payment by measurement. But we are of opinion that the complainant must bring himself within the words of the section, which appears to contemplate a payment or tender in advance for the supply required, and that as he had neither paid nor tendered anything in respect of a part of the supply he required, viz., that for the bath, there was not a neglect or refusal within the meaning of that section.

We are further of opinion that, having on the 15th of September required a water supply for the bath, Mr. Brooks must be taken to have continued to require such supply until the 29th of September, when he gave notice to the company that he had disconnected the cistern from the bath, and required a supply only for his ordinary use and for the water-closet; for we think that the neglect or refusal referred to in the 43rd section, and which is to be visited with a penalty, must be a neglect or refusal with knowledge of the circumstances entitling the owner or occupier to a supply. After the notice of the 29th of September it appears to us that the company were in default in refusing to supply water for ordinary use and for the water-closet, and that they were not entitled to insist upon the outlet pipe of the bath being removed. Although the company cannot be convicted for the refusal to supply between the 20th and 29th of September, because the Act only authorizes the imposition of a penalty where the water rate or remuneration for the supply required has been paid or tendered in advance, yet they were not in our opinion justified in cutting off the supply, and consequently do not fall within the principle laid down in *Sheffield Waterworks Co.* v. *Wilkinson* (1), and were not entitled to require Mr. Brooks to renew the communication.

The result, therefore, is, that in Brooks' case both appeals must be dismissed, and as each party has succeeded in part there must be no costs.

Judgment accordingly.

Solicitors for the company: *Pattison, Wigg & Co., for Broomhead, Wightman & Moore.*

Solicitors for Carter and Brooks: *Pitman & Son, for Chambers & Son.*

(1) 4 C. P. D. 410.

E. L.

1882
April 25.

ABBOTT AND ANOTHER *v.* ANDREWS.

Practice—Costs—Trial by a Jury—Nonsuit—Costs of Issues upon which Plaintiff has been Nonsuited—Order LV., r. 1—Procedure where ambiguity in Judgment as to Costs.

In an action tried by a jury where the plaintiff succeeds upon some issues but is nonsuited upon others, and no order is made as to costs, the defendant is entitled under Order LV., rule 1, to the costs of the issues upon which the plaintiff was nonsuited.

Where there is an ambiguity in the terms of a judgment with respect to costs, and the master in consequence refuses to tax the costs of one of the parties, the proper course is to apply for a direction to the judge who tried the cause, and not to appeal against the master's decision.

MOTION by way of appeal from an order of North, J.

The claim was for damages; 1, for trespass to the plaintiffs' dwelling-house and garden, and, 2, for the obstruction of light and air to their premises.

Particulars were delivered to the defendant of the damage alleged in respect of the trespass.

At the trial, before Lord Coleridge, C.J., and a jury, at the Winchester Summer Assizes, 1881, the plaintiffs were nonsuited upon the issues relating to the alleged trespass, and the jury found a verdict for the plaintiffs on the other issues, with 40*l.* damages.

No order was made or asked for as to costs.

The judgment drawn up by the associate stated that it was adjudged that the plaintiffs be nonsuited as to such part of the claim as was referred to in the particulars, and that it was further adjudged that the plaintiffs recover against the defendant 40*l.* and their costs, to be taxed.

The master refused to tax the defendant's costs of the issues upon which the plaintiffs were nonsuited, on the ground that by the terms of the judgment a taxation of the plaintiffs' costs only was directed, and it was uncertain whether or not the judge had intended to make an order as to costs.

North, J., affirmed the master's order.

Winch, for the defendant, contended that the defendant was

entitled to the costs of the issues upon which the plaintiffs had been nonsuited: citing *Myers* v. *Defries*. (1)

R. H. Simonds, for the plaintiffs. The defendant's proper course was to apply for a direction to the learned judge who tried the cause in order to remove any ambiguity in the terms of the judgment. But it is further submitted, in accordance with the view taken by North, J., that the defendant is not entitled, under Order LV., rule 1, to the costs of the issues upon which the plaintiffs were nonsuited as being costs which follow the event of the decision of the jury. Where there is a nonsuit no issues are tried by the jury within the meaning of Order LV., and application should have been made at the trial in order to entitle the defendant to costs.

LORD COLERIDGE, C.J. I think the defendant is entitled to the costs of the issues upon which the plaintiffs were nonsuited. The action was tried by the jury, if these issues were not, and Order LV., rule 1, therefore clearly applies to give the defendant those costs. But he ought to have applied to the judge who tried the case to correct any ambiguity in the judgment instead of appealing from the master's order. The plaintiffs, therefore, will have the costs of this motion.

GROVE, J., concurred.

Motion refused.

Solicitors for plaintiffs: *Geare & Sons, for Bowker & Son, Winchester.*

Solicitors for defendant: *Pickett & Mytton, for White, Winchester.*

(1) 5 Ex. D. 180.

W. A.

1882

April 28.

LUMSDEN *v.* WINTER.

Reply, effect of non-delivery of — Judgment on Admissions in Pleadings — Counter-claim — Order XXIX., r. 12; Order XL., r. 11.

The plaintiff having made default in delivery of reply to defendant's statement of defence and counter-claim:—

The Court ordered final judgment to be entered for the defendant in respect of both the claim and counter-claim under Order XL., rule 11.

ACTION for unliquidated damages for breach of contract and statement of claim accordingly.

The statement of defence denied the allegations of the statement of claim and counter-claimed for money lent by the defendant to the plaintiff.

The plaintiff having made default in delivery of reply, the defendant moved for judgment against the plaintiff on the claim and counter-claim.

A. T. Lawrence, for the defendant. By Order XL., rule 11, any party to an action may at any stage thereof apply for such order as he may upon any admissions of fact in the pleadings be entitled to without waiting for the determination of any other question between the parties. By Order XXIX., rule 12, if the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted. It follows that the statements of the defence and counter-claim must be treated as admitted, and the defendant is entitled to judgment accordingly.

[LOPES, J. Is not your proper remedy to apply to dismiss the action for want of prosecution under Order XXXVI., rule 4a?]

That rule only applies when, after the close of the pleadings, notice of trial is not given; but in this case there is nothing to try as all the allegations of the defence and counter-claim are to be taken as admitted. The defendant wishes for judgment on the counter-claim, not merely to dismiss the action.

[GROVE, J. The terms of Order XL., rule 11, seem hardly applicable to final judgment in the action. They seem rather to apply to some interlocutory relief.]

The rule appears to have been held to apply to final judgment: *Rutter* v. *Tregent* (1); *Re Smith's Estate* (2); *Parson* v. *Harris.* (3) The decision in *Litton* v. *Litton* (4) is not in point. All that was decided there was that a defendant seeking to dismiss the action could not proceed under Order XL., rule 11. The defendant here does not seek to dismiss the action, but asks for judgment. [He also cited *Jenkins* v. *Davies.* (5)]

Calvert, for the plaintiff, shewed cause. The defendant's proper course is to give notice of trial under Order XXXVI., rule 4, or to apply for an order dismissing the action under Order XXXVI., rule 4a.

It is a matter of discretion whether the Court will order judgment under Order XL., rule 11: *Mellor* v. *Sidebottom.* (6) Apart from the counter-claim, the defendant's proper course would obviously be to apply to dismiss the action for want of prosecution. It is submitted that for this purpose the counter-claim must be treated merely as a defence. It is not practically the same as a cross-action, it has been held to depend on the action, and if the action is discontinued it falls to the ground: *Vavasour* v. *Krupp.* (7)

GROVE, J. I have not been without doubt in this case, but on the whole I think we must give judgment for the defendant. The provisions of the rules with regard to counter-claims are not very distinct, so far as this point is concerned, but Order XIX., rule 3, which says that a counter-claim shall have the effect of a statement of claim in a cross-action, seems to be applicable in this as in other cases. That being so, the counter-claim here is in the same position as if it had been a statement of claim. Then by Order XXIX., rule 12, if no reply is delivered, the pleadings are

(1) 12 Ch. D. 758.
(2) 24 W. R. 392.
(3) 6 Ch. D. 694.
(4) 3 Ch. D. 793.
(5) 1 Ch. D. 696.
(6) 5 Ch. D. 342.
(7) 15 Ch. D. 474.

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to be deemed closed, and the statements of fact in the pleading last delivered are to be deemed to be admitted. It must be taken therefore in this case that the statements of fact in the counter-claim are admitted. Then by Order XL., rule 11, the defendant may move for any order to which he is entitled on admissions in the pleadings. I must admit I should have been inclined to think that this rule was not applicable to the present case, but for the decisions on the subject. It comes after a rule which expressly provides for motions for "judgment," and the word "judgment" is not used in it, but the word "relief" which is not the term generally used to indicate final judgment. It seems, however, that Courts of co-ordinate jurisdiction have held it to apply to final judgment, and by their decisions we are bound. So construing the rule the case seems by virtue of the other rules to which I have referred to be brought within it, and the defendant appears to be entitled to judgment on the counter-claim as well as the claim. If he is not so entitled, either the action remains suspended and he gets no relief on his counter-claim, or he must elect to dismiss the action for want of prosecution, and so abandon his counter-claim and bring a fresh action in respect of it. It seems to me on the whole, though not without doubt, that the defendant is entitled to judgment.

LOPES, J. If there had been no decision on the subject, I should have been inclined to doubt whether Order XL., rule 11 applied to final judgment, or only to interlocutory measures of relief, but the decisions seem to go the length of shewing that the Courts have under that rule granted final judgment on admissions in the pleadings. There does not appear to have been any case in which it has been applied as it is here sought to be applied in respect of a counter-claim, but it seems in principle that the counter-claim must, for this purpose, stand on the same footing as an action. It is urged that the proper course is to apply to dismiss the action, but the defendant seeks for judgment, and it is not clear whether, if he dismissed the action, his counter-claim would not fall to the ground. I think, therefore, we ought to act on the provisions of Order XL., r. 11, and give the defendant judgment on the claim and counter-claim. If the plaintiff has merits it is

open to him to make an application hereafter to set aside the judgment.

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Judgment for the defendant.

Solicitor for plaintiff: *Garrod.*

Solicitor for defendant: *Birt.*

E. L.

[IN THE COURT OF APPEAL.]

March 28.

THE WHITECROSS WIRE AND IRON COMPANY, LIMITED *v.* SAVILL AND OTHERS.

Ship—General Average—Ship on Fire in Harbour—Water poured upon Cargo—Termination of Maritime Adventure—Arrival of Ship at Port of Destination—Cargo remaining on Board.

To pour water upon the cargo pursuant to the master's orders for the purpose of extinguishing a fire which has broken out in a ship's hold, is a general average act, and if the cargo is thereby injured, the owner is entitled to a contribution.

Whilst the cargo remains on board a ship after her arrival at the port of destination, the maritime adventure is not terminated so as to absolve the owners of the cargo and the ship from mutual rights and liabilities.

The defendants were the owners of the H., which having arrived at her port of destination at the end of a voyage, unloaded about 1300 tons of her cargo; about 100 tons remained on board. Whilst she was lying at a wharf, a fire broke out in her hold, and in order to extinguish it her master caused water to be poured into her, whereby some goods, forming part of the cargo and belonging to the plaintiffs, were damaged. The H. might have been scuttled and raised again; but if the fire had not been extinguished, she would have been in peril of partial destruction:—

Held, that the defendants were liable to contribute by way of general average for the damage done to the plaintiffs' goods.

ACTION to recover a contribution by way of general average.

The action came on for trial in London before Pollock, B., when the jury were discharged from giving a verdict, and the following facts were proved or admitted.

The defendants were the owners of an iron ship called the *Himalaya*, and the plaintiffs caused to be shipped on board of her fifty coils of fencing wire to be carried from London to Wellington, New Zealand. The *Himalaya* sailed from London in the beginning of October, 1876, and on the 25th of January, 1877, she arrived at Wellington, and on the 30th she went alongside a wharf and began to discharge her cargo, which then consisted of about

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1400 tons; she continued to discharge until the night of the 15th of February, when only between 50 and 100 tons of cargo, including the plaintiffs' wire, remained on board. Early on the morning of the 16th a fire broke out in the hold of the *Himalaya;* it was extinguished by pouring water into the hold pursuant to the orders of the master. The ship was much damaged by the fire; the skin was charred, and the timber of the deck was charred about half through; she was in imminent peril until such time as the water had put out the fire. If the fire had not been got under speedily, the whole of the woodwork about the ship would have been consumed. Some of the cargo remaining on board was damaged, partly by fire, but principally by the water used in extinguishing the fire. There was some evidence that the plaintiffs' wire had been rendered unmerchantable by the fire; but it was proved that it was injured by the water poured down into the hold. The *Himalaya* was drawing at the time of the fire about eleven feet of water, and the depth at high water at the wharf, where she was lying, was about twenty-two feet. The fire might have been extinguished by removing one of her plates and thereby scuttling her; but much damage would have been done.

Upon these facts it was contended by the defendants that they were not liable to contribute by way of general average for the loss sustained by the plaintiffs through pouring water into the hold upon the wire; but Pollock, B., gave judgment for the plaintiffs.

The defendants appealed.

March 24, 27, 28. *Sir H. Giffard, Q.C.*, and *Pollard*, for the defendants. At the trial the learned judge considered himself bound by previous authorities, but there are only two English decisions which are in point for the question at issue: *Stewart* v. *West India and Pacific Steamship Co.* (1); *Achard* v. *Ring.* (2) In the former case the decision really turned upon the language of the bill of lading; what was said in the judgment of the Court of Queen's Bench as to the law of general average was really obiter dictum; and the question was left undetermined in the Court of Exchequer Chamber. The latter case merely contains an expression of opinion by Cockburn, C.J., in the course of a

(1) Law Rep. 8 Q. B. 88, in Ex. Ch. 362. (2) 31 L. T. (N.S.) 647.

summing up; the real point for the determination of the jury was whether the alleged custom existed in point of fact. These two authorities may be reviewed upon the present appeal. There may be decisions in American courts shewing that the plaintiffs may be entitled to a general average contribution; but they are of no weight, if they are at variance with the law of England.

The real question is whether the incidents necessary to constitute a general average act existed in the present case: in 2 Arnould on Marine Insurance, part 3, ch. 4, pp. 814, 815 (5th ed.) a general average act is defined as consisting "of an intentional act on the part of man, out of the course of the master's ordinary duty as agent of the shipowner, done on account of the common adventure, to avert a total loss of the whole, under circumstances in which it is the only alternative." It will be seen that many of the incidents stated in this definition are wanting in the present case.

The argument for the defendants may be divided into several heads and may be stated in the following manner:

First, there was no "sacrifice." The part of the adventure voluntarily destroyed must be of some value: *Shepherd* v. *Kottgen* (1): here the wire would have been destroyed by the fire and was, in fact, worthless. That case shews that the meaning of the word "sacrifice" had never been previously determined, and that it implies the destruction of something valuable.

Secondly, there was no imminent risk to the whole adventure: in *Harrison* v. *Bank of Australasia* (2) the nature of an imminent peril was discussed, but the judges of the Court of Exchequer were not agreed whether a claim for a general average contribution could be sustained.

[LORD COLERIDGE, C.J. The judges in that case do not appear to differ as to the law.]

In the present case there was no sacrifice of part for the benefit of the whole: no common danger existed, and no common benefit was contemplated, and without these incidents no claim for a contribution can be supported: 2 Arnould on Marine Insurance, part 3, ch. 4, p. 820, 5th ed. There was no danger of an immediate total loss of the whole adventure. There was no peril of

(1) 2 C. P. D. 585. (2) Law Rep. 7 Ex. 39.

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destruction to the vessel; she was built of iron, and might have been scuttled and sunk; and afterwards, the depth of water in the harbour being small, she might have been raised at a little expense; she was not at sea, and the small part of her cargo aboard at the time of the fire might have been burnt or destroyed without substantial injury to the ship. The master, therefore, had an alternative mode of saving the ship. If she had been scuttled and sunk, that would not have been a general average loss; she might be in peril of injury from the fire, but not of destruction, and this is insufficient to uphold a claim for contribution by way of general average. In *Schmidt* v. *Royal Mail Steamship Co.* (1) the fire in the vessel's hold broke out when she was at sea, and when she could not be scuttled and sunk without totally destroying her, and when the only mode of extinguishing the fire, so as to save the adventure, was by pumping or throwing down water into the hold, and that circumstance renders the decision of no authority in the present case. If casks of gunpowder had been in the ship's hold at the time of the fire, the pouring of water upon the plaintiffs' goods might have given rise to a valid claim for a general average contribution; for in that case there would have been an imminent peril common to the whole adventure. In 2 Phillips on Insurance, ch. 15, s. 1, par. 1270, it is said that "in order to constitute a basis for a contribution for an expense or sacrifice, it must be occasioned by an apparently imminent peril," and the proposition is explained in the succeeding paragraph (1271). It is the absence of imminent peril to the ship, which renders the injury to the plaintiffs' goods a particular and not a general average loss. Before *Stewart* v. *West India and Pacific Steamship Co.* (2) and *Achard* v. *Ring* (3), losses like that occurring in the present case were treated as particular average losses, as appears from 2 Arnould on Marine Insurance, part 3, ch. 4, page 817, 5th ed., although, as must be admitted, the correctness of the practice is there doubted.

Thirdly, in order to found a claim for a general average contribution, the act of sacrifice must be out of the master's ordinary duty: here it was the master's duty to extinguish the fire; and his acts

(1) 45 L. J. (Q.B.) 646. (2) Law Rep. 8 Q. B. 88; in Ex. Ch. 362.
(3) 31 L. T. (N.S.) 647.

in discharge of his ordinary duty cannot be converted into a general average loss.

[BRETT, L.J. No doubt, in one sense, it was the duty of the master to pour water into the hold, if he thought that the fire would spread throughout the ship; but can that act be said to have been part of his "ordinary duty?"]

At all events, the master resorted only to the usual method of extinguishing the fire.

Fourthly, at the time of the fire the voyage had terminated and the common adventure was at an end; the vessel had been three weeks in harbour, and had discharged the greater part of her cargo. The liability to a general average contribution is an obligation, not of common law, but of maritime law, and ceases when the adventure is finished, that is, when the carriage of the goods to the port of destination is completed. In the present case, upon the arrival of the vessel at Wellington, the defendants became mere bailees of the goods at the common law; and the liability to contribute had ceased, as is plain from the reasoning in *Mouse's Case.* (1) Suppose a bill of lading for the carriage of goods by canal, railway, lighter, and ship, the goods being part of a common adventure, and suppose that the goods are intentionally destroyed for the benefit of the whole adventure before reaching the ship: no liability to contribute will arise, although a claim for contribution might have been sustained if the goods had been destroyed under similar circumstances after they had reached the ship and after the voyage had commenced. (2)

Cohen, Q.C. (*F. W. Hollams,* with him), for the plaintiffs. It is of no consequence to consider what may have been the practice of average adjusters before *Stewart* v. *West India and Pacific Steamship Co.* (3) and *Achard* v. *Ring* (4); for they always intend to follow

(1) 12 Rep. 63.

(2) *Pollard,* in the course of his argument, alleged that the plaintiffs' wire, at the time when water was poured upon it, had become unmerchantable through damage by fire, and began to argue that on this ground no general average contribution could be claimed; but the Court said that this question had not been raised at the trial, and declined to take it into consideration for the purposes of their decision.

(3) Law Rep. 8 Q. B. 88; in Ex. Ch. 362.

(4) 31 L. T. (N.S.) 647.

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the law as laid down in courts of justice. In the present case it was proved that the plaintiffs' wire was damaged by the water poured into the hold. The only real question is whether the pouring of water into the ship's hold is a general average act: the other questions in this case are concluded by *Atwood* v. *Sellar* (1), which shews that whatever follows from a general average act is the subject of a general average contribution.

[LORD COLERIDGE, C.J. *Atwood* v. *Sellar* (1) certainly shews that any consequence flowing from a general average act is the subject of a general average contribution, although it happens afterwards, and therefore is separated in point of time from the general average act.]

In 2 Arnould on Marine Insurance, part. 3, ch. 4, s. 2, art. 3, p. 914 (2nd ed.), it is said: "When the ship is scuttled to extinguish a fire in her hold," not caused by spontaneous combustion of part of the cargo, "the practice, it seems, is to allow the damage done to the ship as a general average, but not the damage done to the cargo by the water." For this Baily on Average, 75, 82, 83, is cited; in a note the author adds: "Mr. Baily justly demurs to the latter branch of the rule as unreasonable." It is plain that the author considered that damage done to a cargo through scuttling the ship for the benefit of the common adventure ought to be considered as a general average loss; and no difference can exist in principle between scuttling a ship and pouring water down into the hold. In 2 Parsons on Marine Insurance, ch. 5, s. 11, p. 288, it is said in a note "where a cargo is on fire from an accidental cause, and the vessel is scuttled or water is poured down to extinguish the fire, and goods are thereby injured, which the fire had not reached, they are to be contributed for." And in *Nimick* v. *Holmes* (2), the Court were clearly of opinion that damage done by water or steam in extinguishing a fire is a general average loss. [He was then stopped.]

Pollard, in reply.

LORD COLERIDGE, C.J. I think that the plaintiffs, who are the respondents upon this appeal, are entitled to judgment. I understand that the question now comes for the first time before

(1) 5 Q. B. D. 286.

(2) 25 Pennsylv. Rep. 366, 373.

the Court of Appeal, and the point to be decided is whether the facts bring the case within the principles of general average. It must be shewn that an imminent peril existed, and that the master deliberately and for the sake of preserving the adventure sacrificed that in respect of which contribution is claimed. The facts were shortly these. The ship had reached her port of destination, and in a certain sense the voyage was over; a great deal of the cargo had been unladen, but about fifty or a hundred tons remained on board; a fire broke out in the hold, and in order to save the ship and cargo, water was poured down; by pouring down the water the fire was extinguished and the ship was saved, but part of the cargo remaining on board, including the plaintiffs' goods, was damaged by the water.

I am unable to come to the conclusion that this is not a case of general average; the facts seem to me to fall within the definition of a general average act. It is said that it has been until recently the custom to exclude a misfortune of this kind from adjustment as a general average loss, and to treat it only as a particular average loss. Upon turning to Baily on General Average, p. 81, I find the following passage: "The damage done to cargo by pouring water upon it to extinguish a fire, or by water admitted into a vessel's hold when she is scuttled to extinguish a fire, is . . . excluded from general average. In defence of this practice no valid reason can be urged. It is based on an erroneous idea that a general average cannot arise when the degree of danger is so great that it amounts to a moral certainty of total loss, and on a fanciful distinction between the degree of danger existing in cases of fire, and the degree existing when a vessel is on her beam-ends, or on the point of foundering,—a distinction which the ingenuity of argument may draw, but which will not bear the test of common sense." The author here states what the English practice is, but he expresses an opinion condemnatory of it; and he states similar views at pp. 12 n., 40. It has not been the practice in the courts in the United States to treat as particular average a loss occasioned by pouring water into the hold in order to extinguish a fire, and the text-book, 2 Parsons on Marine Insurance, ch. 5, s. 11, p. 288 n., intimates that the loss must be considered as giving rise to a general average

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contribution. How stand the authorities in the English Courts? I may assuredly say that no authority conflicts with our decision. In *Stewart* v. *West India and Pacific Steamship Co.* (1), the judges of the Court of Queen's Bench expressed views which are directly in point; it is true that the question was decided in favour of the defendants, who were resisting the claim for contribution; but the ground of the decision was that, the parties having agreed that average should be adjusted according to "British custom," it must be taken that the "British custom" meant the British practice, by which, according to the statements in the special case, adjusters treated as particular average a loss occasioned by pouring water into a ship's hold in order to extinguish a fire. The parties, therefore, were bound by their agreement not to treat the loss as a general average. But it was laid down that according to the general law the loss was the subject of a general average contribution; and *Nimick* v. *Holmes* (2), was cited and and approved of. *Stewart* v. *West India and Pacific Steamship Co.* (1), went upon error to the Court of Exchequer Chamber, and there no decision was given upon the question of general average; carefully guarded language was used, and the case was decided upon the point that the parties had agreed to be bound by "British custom," and that it was admitted what the "British custom" was. This case was decided in 1873. The question again came before the Queen's Bench Division in *Schmidt* v. *Royal Mail Steamship Co.* (3), decided in 1876. It has been argued that that case is not the same as this; but at all events it strongly resembles *Stewart* v. *West India and Pacific Steamship Co.* (1) It was considered in *Schmidt* v. *Royal Mail Steamship Co.* (3) whether the terms of the bill of lading could override the general law; but it was held that the general law did apply, and that the ship-owners were liable to a contribution by way of general average. The same point appears to have been decided in *Aspinwall* v. *Merchant Shipping Company*, which seems to be nowhere reported. We have therefore the authority of different judges of the Court of Queen's Bench, and of the Queen's Bench Division, for holding that to pour water upon a cargo in order to extinguish

(1) Law Rep. 8 Q. B. 88; in Ex. Ch. 362.

(2) 25 Pennsylv. Rep. 366, 373.

(3) 45 L. J. (Q.B.) 646.

a fire is a general average act; these judges all are of opinion that the law is as has been contended for by the plaintiffs, so far as English law is concerned. No authority is against our decision. In *Attwood* v. *Sellar* (1), the judgment of this Court was delivered by Thesiger, L.J., who points out that the practice of average adjusters professes to follow legal principles and authority. The principle is laid down in the following general terms (p. 289): "The principle which underlies the whole doctrine of general average contribution, is that the loss immediate and consequential caused by a sacrifice for the benefit of cargo, ship, and freight should be borne by all." The decision was in favour of the claim for a general average contribution. On general principles nothing ought to make us hesitate to bring the case before us within the rule of general average.

The fourth point urged on behalf of the defendants is somewhat extraordinary: it has been argued that general average is a branch of the maritime, and not of the common law, and it has in effect been contended that the ship being moored at a wharf the voyage must be taken to have been at an end, and the fire to have broken out, so to speak, on land. The voyage probably had come to an end; and it may possibly be that the liabilities of the underwriters had ceased; but the liabilities of the shipowners upon the bills of lading were still existing, and this shews that the maritime adventure was not at an end. But if any authority is wanted, it may be found in *Achard* v. *Ring* (2); there the voyage was at an end when the fire broke out, for the vessel was discharging her cargo; nevertheless it was expressly ruled by Cockburn, C.J., that by the general law the liability to a claim for a general average contribution attached: that authority disposes of this point.

The rule which we lay down, of course applies only so far as the plaintiffs' wire was damaged by water; for there must be an intentional sacrifice. But no distinction between damage by water and damage by fire was made at the trial, and the case was rested upon the point whether goods damaged by pouring water upon them in order to extinguish a fire are the subject of a general average contribution.

(1) 5 Q. B. D. 286. (2) 31 L. T. (N.S.) 647.

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I think that the plaintiffs, who are the respondents upon this appeal, are entitled to judgment.

BRETT, L.J. This is an action by the owners of part of a cargo against the shipowners for a general average contribution: it was tried before Pollock, B., without a jury, and I will in the first instance proceed to state my view of the facts. It is the case of an ordinary maritime adventure: the vessel was in port and had unloaded a considerable part of her cargo, but a fire had broken out on board, and if it was not checked there would have been at all events a partial destruction of the ship and of the remaining cargo; if she had been scuttled, great damage would have been done to her: the master poured water into her in order to extinguish the fire: this was a reasonable step to take: however the cargo was damaged and injury was done to it by water. The question is whether the injury to the plaintiffs' wire constitutes a general average loss. The law of general average is subject to certain rules; there must be danger, there must be an intent to "sacrifice." If there is an imminent danger, and if the captain sacrifices part in order to save the rest of the adventure, a claim for a general average contribution arises. It has been argued that there must be danger of an immediate total loss of the whole adventure: some phrases in Arnould on Marine Insurance appear to justify this contention; but I think this argument has been pushed too far on behalf of the defendants. Mere bona fides on the part of the captain is not sufficient, it must be shewn that those circumstances did in fact exist which give rise to the right of contribution. In this case there was imminent peril to the whole adventure; and if a danger did exist such as to make the sacrifice reasonable, and if a part of the adventure was sacrificed for the benefit of the whole, then a claim for general average arises, and it is insufficient to shew that complete destruction was not imminent. It has been argued that no total loss of the ship would have occurred in the present case, because she was built of iron and could not be destroyed by fire; but it was proved that the fire had got a strong hold upon her, and it would have burnt her woodwork, such as her deck and masts, and also her sails; if the fire had not been extinguished, she would have been brought

almost to the state of a wreck. It has been said that the defendants' vessel might have been scuttled; but the expense of raising and repairing her would have entitled her owners to a general average contribution; and because an apparently alternative mode of proceeding existed, the captain cannot be said to have acted unreasonably. It is said that it was within the captain's ordinary duty to extinguish the fire; still it was his duty to carry the goods safely, and in extraordinary circumstances he becomes in effect the agent for all parties. As I have before said, there must be an intentional sacrifice: here the captain intentionally inundated the cargo, and thereby necessarily damaged it by water. I wish to point out that if the ship had been improperly flooded, the owners of the cargo would have a right of action against the shipowners for all the cargo injured. Similarly if, under the pretence of preserving the adventure, the cargo is jettisoned without due cause, the owner will have a right of action against the shipowner for the whole of his loss. All the circumstances seem to me to exist which constitute a general average loss.

It has been argued that at the time of the fire the voyage was finished, and the maritime law had ceased to operate; but the maritime adventure was not at an end, it was not at an end until all the goods were delivered.

Some evidence was given that the wire was so damaged by the fire as to be unmerchantable at the time, when the water was poured upon it; but no point as to this was raised at the trial, and no question can be raised now.

Agreeing with previous decisions cited before us, we ought to declare that the facts proved in the present case gave rise to a claim for a general average contribution. In *Stewart* v. *West India and Pacific Steamship Co.* (1) the judges of the Court of Exchequer Chamber thought it better not to determine the question before us, it not being necessary for the decision of the action.

HOLKER, L.J., concurred.

Judgment affirmed.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*

Solicitors for defendants: *Ingledew & Ince.*

(1) Law Rep. 8 Q. B. 88; in Ex. Ch. 362.

J. E. H.

1882
April 3.

[IN THE COURT OF APPEAL.]

ORMEROD AND OTHERS *v.* THE TODMORDEN JOINT-STOCK MILL COMPANY (LIMITED).

Trial—Compulsory Reference—Judicature Act, 1873, *ss.* 56 *and* 57—*Appeal from Judicial Discretion in directing Trial before an Official Referee.*

The Court of Appeal has power to review the order made by a judge under s. 57 of the Judicature Act, 1873, who, having jurisdiction to make such order, has in the exercise of his discretion ordered the issues of fact in an action to be tried by an official referee, on the ground that they required prolonged examination of documents and also scientific and local investigation; but the Court of Appeal, whose discretion in such case is to be substituted for that of the judge, will not exercise such discretion except in a strong case where it clearly thinks the judge has wrongly exercised his discretion, and that an injustice has been done by the order he has so made.

So *held* by Brett and Holker, L.JJ. (Lord Coleridge, C.J., doubting if the Court had jurisdiction to review the discretion of the judge).

Semble, per Brett, L.J., that the "prolonged examination of documents," intended by s. 57 of the Judicature Act, 1873, is an examination required to enable the judge to leave questions of fact to the jury; and not an examination to enable him to determine a question of legal right.

THE plaintiffs and defendants are cotton-mill owners at Todmorden, in Lancashire, having their mills near the river Burnley. In their statement of claim the plaintiffs stated that they were possessed of a goit or culvert communicating with the river, by means of which they made use of the water of the river for supplying certain condensing low-pressure steam-engines used by them for driving machinery in their mill, and they alleged that the defendants, at a point above the goit, diverted the water of the river to the mill and premises of the defendants, and there wasted a quantity of it and returned the residue into the river very hot and unfit for supplying the condensers of the plaintiffs' steam-engines. The plaintiffs also alleged that the goit was a branch of the river, and that the plaintiffs were riparian proprietors on the same in respect of their mill, and as such were entitled to use the water. They claimed damages, and also an injunction.

The defendants, by their statement of defence, denied that the plaintiffs were riparian proprietors, and asserted that the

defendants were riparian owners, and further that certain pipes by which they were alleged to have diverted the water were carried with the license of the occupiers and owners of the riparian estate of which their mill formed a part. They also denied waste to any appreciable extent, and any increase of the temperature of the water so as to injure the plaintiffs.

The action originally came on for trial at the Manchester Summer Assizes of 1880, before Lindley, J., who, being under the belief that the case resolved itself into one of law, made an order by consent for the statement of a special case, reserving all questions of fact to be tried or otherwise dealt with after the points of law had been disposed of. No special case was however stated, as the parties were unable to agree upon one. The defendants stated that they were advised that the question of fact as to whether or not they interfered to any appreciable extent with the volume and temperature of the water lay at the root of the whole action and that the decision of that issue in the defendants' favour would dispose of the action, and render the issues of law of the plaintiffs or defendants being riparian owners, or of the defendants being licensees of a riparian owner, immaterial. The parties being thus unable to agree, went afterwards before Lindley, L.J., but that learned judge declined to settle the case, stating that he had been under a misapprehension of the facts when he made the order for a special case, and he therefore directed that the action should be set down again for trial.

Under these circumstances, the action came on for trial before Pollock, B., and a special jury, at the assizes holden at Manchester in January last, eleven of whom had previously had a view of the locus in quo under an order of the judge that the jury should have a view.

Directly after the plaintiffs' counsel had completed his opening speech the learned judge interposed, and said that it seemed to him that the action was not fit for trial at the assizes, and thereupon, notwithstanding the strenuous opposition of the defendants' counsel, he made an order under s. 57 of the Judicature Act, 1873 (1), in the following terms: "It is ordered by the Court,

Part 6/6

(1) Sect. 57 of the Judicature Act, 1873:—"In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court,

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that this being a cause or matter requiring prolonged examination of documents, and also scientific and local investigation, which cannot in the opinion of the judge conveniently be made before a jury, or conducted by the Court through its other ordinary officers, and the defendants not consenting thereto, the questions and issues of fact raised by the pleadings in this action be tried by an official referee, and that this action be adjourned for further consideration."

The defendants appealed against this order.

March 28. *C. Russell, Q.C.*, and *H. Collins*, for the defendants. The order was wrongly made, or, at all events, the judicial discretion of Pollock, B., was wrongly exercised, and if his order is upheld the actions in the Queen's Bench Division will be reduced to actions for breach of promise of marriage, slander, and libel. No doubt s. 57 of the Judicature Act, 1873, has a very wide operation, but it is a condition precedent to the jurisdiction of the judge to make the order under that section, that the matter is one requiring a prolonged examination of documents, or a scientific and local investigation: *Longman* v. *East.* (1) Here no such prolonged examination was required. It is not suggested that the official referee was to try the title of the plaintiffs, or to decide questions of law as to whether they were or not riparian owners. Neither was there required any scientific or local investigation. If there was any scientific investigation it was of the most ordinary kind,

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in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local examination, which cannot in the opinion of the Court or a judge conveniently be made before a jury, or conducted by the Court through its other ordinary officers, the Court or a judge may at any time, on such terms as may be thought proper, order any question or issue of fact, or any question of account arising therein, to be tried either before any official referee to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties, and any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by rules of Court, and subject thereto in such manner as the Court or judge ordering the same shall direct."

(1) 3 C. P. D. 142.

being merely a case of testing the heat and volume of the water, and as regards local investigation, railway accidents, rights to light and air, and even mere trespasses, might equally be called matters of local investigation. There was in truth nothing which might not very easily have been determined by a jury, especially a Manchester special jury, composed, as it would be, of persons well acquainted with the working of cotton mills, and in every respect far better qualified to deal with the matter than an official referee.

[HOLKER, L.J. Is there any case shewing to what extent this Court can review the discretion of the judge?]

No, it must be admitted that there is not, though the cases shew that the exercise of such discretion is open to review. In *Hoch* v. *Boor* (1), Cotton, L.J., said that the question there was whether the judge had jurisdiction to refer, and if there was, whether the discretion of the judge had been so wrongly exercised that the Court of Appeal ought to interfere.

[LORD COLERIDGE, C.J. The question there was whether the judge had jurisdiction, and the Court held that he had.]

The case of *Leigh* v. *Brooks* (2) raised the question whether an issue as to a fraudulent sale of pictures as genuine pictures by old masters could be compulsorily referred under s. 57, on the ground that the examination of the pictures required a scientific investigation, and the Court of Appeal, though it decided that the case was not one which gave such jurisdiction, was in effect of opinion that if it did, still the order ought not to be made.

Gully, Q.C., and *Aspland*, for the plaintiffs. There was jurisdiction to make the order in this case; and next the learned judge properly exercised his discretion in making such order, and the Court has no power to review it. The question of title turned on a question of identity, which involved the application of the several deeds to the land and not merely their construction, and the matter would therefore necessarily involve a prolonged examination of documents and a local investigation. Moreover, a scientific investigation was necessary as to the volume and temperature of the water which came from the defendants' and the plaintiffs' mills. Therefore there was jurisdiction to make the

(1) 49 L. J. (Q.B.) 665. (2) 5 Ch. D. 592.

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order. Then the Act expressly leaves it to the discretion of the learned judge to determine whether the matter requiring such examination or investigation can be conveniently gone into by a jury; and as this is left entirely to his opinion, it is not a matter which the Court of Appeal has power to review: *Swindell* v. *Birmingham Syndicate.* (1) Even if there is power to review, it is clear that the Court will not interfere with the exercise of the discretion of the judge, unless a very strong case is made out of his discretion having been wrongly exercised: *Ruston* v. *Tobin.* (2)

H. Collins replied.

Cur. adv. vult.

April 3. LORD COLERIDGE, C.J. This is a case in which I feel great repugnance to be compelled to give a judgment, and as to which I much regret that it has ever arrived at the stage in which we find it. Any judgment I pronounce will be hard upon one or other of the parties; but the case must be decided one way or the other, and it raises, no doubt, a question of great practical importance which at some time or other will have to be settled.

The two parties are millowners, and the action is brought to recover damages for the alleged abstraction of water by the defendants from the Burnley river, and returning it appreciably and injuriously lessened in quantity, and so heated as to be unfit for the purposes for which the water of the stream had been used, and rightfully used, by the plaintiffs. The pleadings raise questions of law and questions of fact, and the case was set down for trial at Manchester in August, 1880, before the then Mr. Justice Lindley. At his suggestion it was agreed that a special case should be stated, so that the points of law might be settled before the trial, if after such settlement trial were necessary, of the issues of fact. But the special case could not be agreed upon; neither learned counsel, I am obliged to say, could have seriously expected that his opponent would agree to his statements; Lindley, J., who had meanwhile become Lord Justice, could not give the time necessary to settle the disputes, I must

(1) 3 Ch. D. 133. (2) 10 Ch. D. 558.

say the unreasonable disputes, which arose upon the special case; and he sent it down again for trial, observing more than once that if he had been aware of the nature of the case he should not have attempted to get it turned into a special case, but should have tried it out himself.

The case came on again at the Manchester Assizes in January, 1882, before Pollock, B. It was set down as a special jury case, and eleven of the jurors impanelled to try it had had a view, to which the consent of both parties was necessary, as the locus in quo was beyond the boundary of Lancashire. At the end of the opening speech of the plaintiffs' counsel, certainly not in any way at *his* invitation, and against the strenuous resistance of the defendants' counsel, Pollock, B., referred the case for report to an official referee, by an order under and following the language of the 57th section of the Judicature Act, 1873. Against that order the defendants have appealed.

It is, I am aware, a difficult and ungracious task to review the discretion of a judge, and to comment unfavourably upon its exercise in a particular case. It may be that we have not all the facts before us which influenced his mind, or, if we have, that they are presented to us in a different light and in different relations. His judgment has to be exercised at the moment and with little argument, ours after lengthened argument and time taken for consideration. This is all true, and always to be remembered; yet at last this Court must pronounce the judgment which on reflection it thinks right, and after much reflection I am obliged to say that this is an order which it is impossible not to regret should ever have been made. Both parties were anxious to try the case; both parties assured the judge that in their judgment the case could have been disposed of in a very reasonable time. There certainly was an issue of fact, viz., whether water had or had not been unduly abstracted, and injuriously overheated by the defendants, which if decided in their favour put an end to the action, and which was peculiarly fit for the consideration of a Manchester special jury; both parties had incurred large and abortive expense already; no attempt was made by the learned judge to try the issue of fact, nor to ascertain experimentally whether the statements of counsel,

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that it was a cause readily admitting of trial, were well justified or no. It is an example of forming and adhering to an opinion against pointed remonstrance and in the absence of practical evidence, and I feel the force of the observation of Mr. Russell, that if such orders were often made few trials of any importance could ever proceed before a jury, and the business of the Queen's Bench Division would be reduced to cases of inferior importance, and in which the stake is insignificant.

But although I certainly should not have made the order myself, I must decline to interfere with it when made, on two grounds: First, I think that Mr. Baron Pollock had jurisdiction to make the order, and that we *ought not* to interfere with his discretion. Secondly, I am by no means satisfied that we have *jurisdiction* to review this particular kind of order, and if it were necessary, and I think it is not, to decide the case on this ground, I am prepared, as at present advised, to hold that we have not. I will deal with these two reasons in their order:

First, I observe that the learned Baron's order follows carefully the words of the section in the statute. The words are these [His Lordship here read the 57th section (1)]. The order is this [His Lordship here read it (2)]. Was there, then, jurisdiction to make this order? I think there was. This is a question which I am clearly of opinion is open upon appeal. The statute lays down that the cause or matter as to which the opinion of the judge is to be formed, must be one which requires, in fact, a prolonged examination of documents or accounts, or a scientific or local investigation. It is this examination or investigation on which the judge is to form his opinion, and the existence of the necessity for such examination or investigation in fact is a condition precedent to the judge having the right to form such opinion. However inconvenient he may think the trial before a jury on other grounds, he cannot, at least under this section, interfere. If there were no documents or accounts, no scientific or local investigation, the judge would have no right to make such an order as has been made here, however expedient it might be on other grounds to make it, and if he did it could undoubtedly be rescinded on appeal. Here, however, it appears to me the

(1) See this section in note, p. 665. (2) See the order set out at p. 665.

condition precedent existed and the jurisdiction attached. The cause did require a prolonged examination of documents, so prolonged that Lindley, L.J., on that ground only had tried to have a special case stated. If those documents were to be examined and the title argued out at the trial, it is, I think, clear that the examination must have been in the fair meaning of the word "prolonged." It matters not, for this question of jurisdiction, that the more convenient and least expensive course may have been to try the questions of fact by the jury, and hear the point of law argued afterwards if argument turned out to be necessary. It matters not that the scientific character of the so-called scientific investigation may be more than doubtful, so that on this point I agree with the opinion pretty plainly intimated by Lindley, L.J. The conditions precedent are stated disjunctively in the section; if any one exists the jurisdiction attaches; and I think that, as I have explained, one did exist, and that therefore the jurisdiction attached.

I have said already that I should not have so exercised it in the same circumstances, but assuming that I have the power to interfere, I think it the least among many evils not to do so. There have been already two abortive trials; the case is now, at last, in train of settlement by some tribunal, not perhaps the best for the purpose, but one which will at any rate dispose of it, and it seems better to leave it where it is than to force it to a third beginning, perhaps to be again abortive. In the only two reported cases which I have been able to find, in which the discretion of a judge as to the mode of trial has been questioned, the Court of Appeal has used the strongest language as to this discretion. In *Swindell* v. *Birmingham Syndicate* (1) James, L.J., says, "It is essentially a matter of discretion, and this Court will not interfere with the Vice-Chancellor's discretion." "The Court," says Mellish, L.J., "has a discretion whether there shall be a trial by jury." In that case there were charges of fraud, and the plaintiffs claimed a jury. Hall, V.C., refused it, and the Court of Appeal upheld him, holding that it was within the 26th rule of Order XXXVI., where the words are, "if it shall appear desirable," and they upheld him simply apparently on the ground that it was for *him* to decide, and that "if it appears desirable"

(1) 3 Ch. D. 133.

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to him there was an end of the matter. In *Ruston* v. *Tobin* (1), where also there was a question of fraud and a jury was claimed under the 3rd rule of Order XXXVI., Malins, V.C., refused it, and the Court of Appeal again upheld him. James, L.J.'s, judgment is every word of it important. "I repeat," he says, "what I have often said before, that these appeals from the discretion of a judge as to the mode in which a case before him can most conveniently be tried, ought not to be brought. When a judge has a discretion as to the mode of trial, his exercise of that discretion is not to be interfered with. If he were to say that he exercised it in a particular way, because he held a certain opinion on a matter of law, and the Court of Appeal considered that he was wrong in his opinion on that matter of law it would interfere; but I think that there is hardly any other case in which it would do so." Jessel, M.R., is not quite so strong, but he is emphatic too. Again, under the the 6th section of the Common Law Procedure Act, 1854, power of compulsory reference is given to the judge "at his discretion," and "if it shall appear to him that the matter cannot conveniently be tried before him." Hundreds of orders must have been made under the authority of this section between 1854 and 1873. During those nineteen years I was in fair practice at the bar, and I never heard of any attempt being made in any single case to rescind such an order. The section, it may be said, points in its language to orders made at nisi prius, which, under the old practice, it was difficult or impossible to review. This is true; but as the words of the section are very like the words of the section under which Baron Pollock acted, they afford a very fair argument that the words of the latter section import that the discretion is not to be reviewed, as it was not to be and could not be reviewed under a section both in object and phraseology so very much the same. On the first ground, therefore, assuming that we have jurisdiction to interfere, I think it is a jurisdiction which we ought not to exercise.

But there are considerations more properly belonging to the second ground, and shewing that we have not the right to interfere, which are cogent also to shew that if we have the right it is one

(1) 10 Ch. D. 558.

which should not be exercised. As a general rule I do not for a moment question the power of this Court to review the orders of judges. The 19th section of the Judicature Act, 1873, gives no doubt in general terms to this Court jurisdiction and power to hear and determine appeals from any order of any judge, *subject to the provisions of this Act.* But if, according to the fair interpretation of the Act itself, certain orders are not intended to be subject to appeal, why then the 19th section will not subject them. Now, I distinguish between the rules (which have the force of law) on which the two cases to which I have referred have been decided, and the sections of the Act now under consideration on the one hand, and the sections which were under consideration in the other three cases to which reference has been made, on the other. The cases of *Golding* v. *Wharton Saltworks Co.* (1), *Watson* v. *Rodwell* (2), and of *Davy* v. *Garrett* (3), cases on which reliance has been placed as shewing that we possess that jurisdiction, were all cases concerned with the allowance or reformation of certain pleadings. The points raised were points which, to use the language of James, L.J., in *Golding* v. *Wharton Saltworks Co.* (4), "depend on the discretion of the judge;" very different, as I think, from matters the determination of which has been committed to his discretion by the very words of the statute itself. There are certain general rules laid down as to the character of pleadings, and the judges have to enforce obedience to these rules. In so doing, from the very nature of the case and the infinite variety of circumstances, the application of these rules must be infinitely varied. In such matters much must *depend on* the discretion of the judge; and the Court of Appeal, while quite properly asserting its right to see the general rules obeyed, and overruling quite properly, if requisite, as in *Davy* v. *Garrett* (3), the discretion of the judge, has intimated repeatedly that it would do so only in strong cases, and always with reluctance. But in such a case it seems to me no question could reasonably be made that the statute intended the Court should if necessary enforce the due execution of its own provisions, and therefore unquestionably if necessary overrule, as it did in the last cited case, the discretion of the

(1) 1 Q. B. D. 374.
(2) 3 Ch. D. 380.
(3) 7 Ch. D. 473.
(4) 1 Q. B. D. 374, at p. 375.

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judge. The language of the judges in these pleading cases is very different indeed from the language used when the question is as to the mode of trial, where words importing absolute discretion are used by the statute. This Court has reviewed discretion in matters of pleading. Mr. Collins told us he had been unable to find any case in which this Court had ever, in fact, reviewed discretion as to mode of trial. But, further, the consequences of holding that we can review this order are startling indeed. I have said that I do not approve of this order, but an order of this kind, which every reasonable man would heartily approve, might by a rich suitor who sought delay be appealed through this Court to the House of Lords. Again, if a judge were applied to for such an order as this, and from mistake or perversity were to decline, this Court, if the contention before us is correct, could interpose, take the case half tried out of his hands, and then on further appeal have perhaps its own order reversed and the half-tried case sent back again by the House of Lords to be tried, I suppose, by the same judge and the same jury, if they are to be found, after an interval of months—perhaps of years.

Yet when the suspended trial is renewed, if indeed renewed it can be, the rest of it (for it is to be remembered the interference may take place at any stage of the trial) may be had under absolutely different conditions. Witnesses may die, counsel may change, facts may alter, circumstances may vary; what was (I will assume) wrong discretion in 1881 may become to the satisfaction of every one right discretion in 1883, and so the suspended trial is ordered to be recommenced, to be again referred with entire approbation. Anything more cumbrous and inconvenient I can hardly imagine; few things more mischievous; and I certainly do not think the statute meant anything of the kind. I think it meant what it has said; that if certain conditions precedent exist the judge has power to act upon his opinion, and that, having acted on his opinion, there can in the nature of the case be no appeal, because being in fact of that opinion he has by the statute power to act upon it. The statute seems to me for convenience and for the conduct of business to trust the judges; to assume that they will act with conscientiousness and in good faith. It is not suggested here that there was want of either, but if there were

in any supposable case such a want, it is, I think, the least of two evils, and better on the whole, that now and then a wrong order should be made, than to do violence, as I think we should, to the language and intention of the statute by allowing an appeal in a matter utterly unsuitable to it, and committed by Parliament itself to the conscience of the judges.

I do not say that if the opinion was not bonâ fide, if (let the supposition be permitted) a judge were to come into court and say he was of opinion that no case in the list could be conveniently tried because he wanted to be elsewhere, that in such a case there would be no appeal. I think there clearly would; but in a case of bona fides and conscientious opinion I am, as at present advised, of opinion that the discretion of the judge in this particular case and under this particular section was not intended to be and cannot be reviewed.

BRETT, L.J. I have never been more distressed than I am now at having to come to the conclusion to which I feel I must come in this case, and especially when I find that my Lord, who is not like myself always in this court, is of a different opinion to that which I am obliged to hold. This case, as my Lord has stated, came on for trial at Manchester before Mr. Baron Pollock; the parties and their witnesses were there, and the jury, a special jury, had had a view under a judge's order, and eleven of them who had had such view were in the box ready to try this case, when the learned judge against the desire of both parties declined to allow the case to be so tried and referred it to an official referee. Now the reason given by the learned judge for doing so was substantially this, that he had made up his mind ever since he was a judge, and meant to act upon it as long as he was a judge, unless this Court should say that such a rule of conduct was wrong, that whenever there was a considerable number of documents to be looked into for any purpose he should insist upon referring the cause. That, however, is not the reason given in the order, for the order is drawn up, as my Lord has noticed, in the terms of the 57th section of the Judicature Act of 1873. The first and most important question which I will consider is whether, assuming the conditions named in this 57th section to

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have existed, this Court has jurisdiction to review the discretion of the learned judge in such a case. I am of opinion that this Court has that jurisdiction. It has been laid down in this Court in several cases that according to the Judicature Act there is an appeal to this Court from every order of a learned judge or of the Divisional Court, unless such appeal is expressly or by necessary implication taken away by the Judicature Act or by some other statute which is unrepealed. There is no express enactment either in the Judicature Act or any other statute that there shall be no appeal from a matter of discretion in such a case as the present. Therefore the question as to the jurisdiction of this Court must depend upon whether by implication the appeal is taken away. The general right of appeal to this Court is given by the 19th section of the Act of 1873, and the words of that section are: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order save as hereinafter mentioned of Her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed as may be made pursuant to this Act." Now, with deference to my Lord, my view of that section, and the one on which I think this Court has hitherto acted, is that the only limitation of appeal "from any judgment or order" is "save as hereinafter mentioned," and that the words "subject to the provisions of this Act" are in the same condition as the words which are coupled with them, namely, "such rules and orders of Court" as may be made, and that therefore the words "subject to the provisions of this Act" are only as to the mode of procedure on appeal, and are not words of limitation of appeal to this Court. It is true that in some cases we have gone further and have said if the Judicature Act has not in terms repealed Acts which say positively that there shall be no appeal those statutes unrepealed remain in force, but that where there are no such statutes then the only limitation is in those words in the 19th section "save as hereinafter mentioned." If that be so, we are thrown in this case upon the 57th section to see whether there are there stipulations which take away the jurisdiction of appeal which is given in

the 19th section under the general words "from any judgment or order." The 57th section first of all sets out the conditions precedent to the judge or a Court being allowed to have any opinion upon this matter, and I agree that neither Court nor judge has any jurisdiction to form any opinion as to whether that cause can be conveniently tried before a jury, unless within the meaning of this section the cause does require a prolonged examination of documents or accounts or any scientific or local investigation; and I agree further that if the judge or Court were to form an opinion and act upon it as to the mode of trial, assuming that one of these conditions existed, and that condition did not exist, this Court would certainly have jurisdiction to say whether the conditions precedent existed or not. Now the only power given to the Court or a judge under this section is to order that the issues of fact shall be referred. There is no power to refer issues of law, and I am very much inclined to think that the prolonged examination of documents which is intended in this section is a prolonged examination of such documents as it is necessary to inquire into in order to enable the judge to leave the questions of fact, and where the examination is not so required, but only to enable the judge to determine a question of legal right, I doubt very much whether it is an examination within this section. If that be true then that condition precedent did not exist in this case, because the issues of fact which will have to be inquired into by the official referee here are it seems to me independent of the documents. The documents raise a question of law as to the title of the parties, which must be decided by a Court or a judge alone, and without the assistance of the jury.

It however is said in the order that this case required a scientific investigation, and in a certain sense it seems to me that it did, that is to say there was a question what amount of heat in the water when it arrived at the plaintiffs' mill would interfere with the operations of the machinery in this mill, and it was admitted that there were some two or three scientific witnesses to inform the jury upon that fact. A scientific witness might (although I do not think he could) assist the jury in coming to a conclusion as to what amount of heat would be in the water, supposing a certain amount of water to have been heated to a

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certain extent in the defendants' mill and then to have passed through a given volume of water a certain distance to the plaintiffs' mill. It seems to me that there was therefore just a sufficiency of scientific investigation in this matter to prevent us from saying that the learned judge had no jurisdiction, and, indeed, I think I am bound to say he had jurisdiction; consequently, the question must be as to the exercise of that jurisdiction.

We must, therefore, now determine whether we have jurisdiction to review that exercise of discretion which he did exercise. It is said that we have not, because s. 57 states the existence of these conditions precedent which it goes on to say, "cannot, in the opinion of the Court or a judge conveniently be made before a jury," and it is said that if the judge has that opinion then we cannot say that it appears he has not that opinion, and therefore from the nature of the thing there is no appeal. I cannot give that force to the phrase I have just referred to. The words "in the opinion of the Court or a judge," seem to me to be equivalent to "according to the judgment of the Court or a judge," and inasmuch as there cannot be any positive rule of law applicable to the particular case, for that reason it is that this opinion is an opinion of discretion as distinguished from an absolute rule of law. If an order as to the mode of trial is made, as it may be, first by a judge at chambers and then by a Divisional Court, such an order must be made only upon affidavits. Therefore, if there is an appeal this Court would have all the same materials before it as were before the judge at chambers and the Divisional Court. In all other cases in which a judge at chambers and a Divisional Court make orders as to any part of the procedure there is an appeal to this Court, then why should there not be such an appeal in this case? If there is an appeal from the Divisional Court making such an order as this, it follows, ex necessitate, that there is from the order of a judge made at the trial, because the section which gives the judge at the trial power to make such an order says that it is an order which may be made by the Court or a judge. Therefore there certainly seems to me no necessary implication in this section that the appeal is taken away, and if there is no necessary implication then the case is within the general words of s. 19.

It has been many times laid down in this Court (probably all the cases are not reported) that this Court has jurisdiction to review the discretion exercised by the High Court, and in the very case of *Ruston* v. *Tobin* (1) I find that the Master of the Rolls begins his judgment thus: "I am of opinion that, as was said in *Swindell* v. *Birmingham Syndicate* (2), the Court of Appeal ought not as a general rule to interfere with the discretion of a judge as to the way in which a case before him shall be tried. There may be a case so strong as to induce it to interfere, but it must be a very strong case." I think that shews that the opinion of the Master of the Rolls was that the Court had jurisdiction, but that it ought not to be exercised except with extreme delicacy. And that is what I take to be the meaning of James, L.J., when he says that an appeal ought not to be brought. I think, if he had meant to say that the Court had no jurisdiction, after having heard the Master of the Rolls' judgment, he would have said an appeal cannot be brought, and he would have stated reasons why he differed from the Master of the Rolls. But in my opinion he agreed with him that the Court has jurisdiction. There are many other cases, but I will not go into them, in which it seems to me that this Court has said that it has that jurisdiction. Now, my Lord has pointed to the consequences which might arise if this appeal were permitted. I cannot but say that, though strictly they might arise, yet they will never occur if this Court will act upon the rules which have been laid down and on which it has always hitherto acted.

Then I come to that which to my mind is more distressing than the question of jurisdiction. I am obliged to say (otherwise I would not be a party to interfering) that I think it perfectly clear that the discretion of the learned judge was wrongly exercised in this case. If we have the jurisdiction to review, it seems to me that the legislature places the discretion in this Court on an appeal in the place of the discretion of the learned judge who this Court thinks has not exercised his discretion rightly. This Court lays down for itself the rule, which I think is the right one, that it will not exercise its own discretion unless it thinks the case is perfectly clear. Now the question whether the water

(1) 10 Ch. D. 558. (2) 3 Ch. D. 133.

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which went out of the defendants' mill would arrive at the plaintiffs' mill with such an amount of heat as to interfere with the condensers of the plaintiffs' engines is one, although it may be a question of science, which to my mind can be decided with the greatest possible ease by any juryman acquainted with machinery or engines, and I think that there could not be a tribunal more capable of deciding such a question than a Manchester jury. How can I, therefore, honestly say that I think this discretion of the learned judge was rightly exercised. The case is taken from a body of men, eleven of whom had seen the place, and of whom there was sure to be several who would understand the whole thing with the greatest facility, and it is given to an official referee, who may not, and if he is like myself, possibly would not, be half as able to understand the matter, and who must go to the place and hear the witnesses there or must have all these Manchester witnesses up to London. It really seems to me to be a case which was most fit to be tried by a jury at Manchester, and which was most unfit to be tried by an official referee either in Manchester or in London. Therefore, though I say it with the greatest reluctance, it is the duty of the Court in my opinion to overrule the discretion which the learned judge exercised, and to say that this trial ought then and there to have been proceeded with, and that the order which was made was entirely wrong.

HOLKER, L.J. The questions which arise in this case present, no doubt, considerable difficulty, but I have thought the matter over as well as I have been able, and having come to a conclusion upon it I think it is my duty to express my views with as much distinctness and precision as I can. The principal question, and certainly the most important one, is whether or not there is an appeal against an order of a learned judge ordering the mode of trial, such as the order in the present case, and I think it follows, whether there would be an appeal against a refusal of a learned judge to make such an order. Now certainly, when I first investigated the matter I was strongly inclined to be of opinion with my Lord that there was no such appeal, and I was of that opinion for some of the very cogent reasons which my Lord has pointed out in the course of his judgment. But after a reference

to the sections of the Judicature Act and to the orders, I have now come to the conclusion that it was the intention of the legislature to give, and that the legislature has given, an appeal from the exercise of the discretion of a learned judge who either makes or refuses an order for an alteration in the mode of trial. By giving an appeal I do not mean that the legislature has enacted that there should be an appeal in the strict sense of the word, but where a learned judge has in making such an order not exercised his discretion properly, that there the Court of Appeal should exercise its discretion in lieu of the discretion of the learned judge. Now I have come to that conclusion upon referring to some of the sections in the Act and to some of the orders. By s. 19 of the Act of 1873 an appeal is given in these very general terms:—[The learned judge here read s. 19.]

The power of appeal which is there given is hardly limited at all, though there is not a universal appeal given against the exercise of discretion. But if one looks at the subsequent sections and the orders made under the Act of Parliament, one will find that there are cases in which an appeal is excluded, and therefore, if it had been the intention of the legislature to have excluded an appeal in a case like the present, one would have thought that language to that effect would have been used. Thus, in s. 49, there is this provision, "No order made by the High Court of Justice or any judge thereof, by the consent of the parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order." There is there an instance in which the legislature distinctly states that there is to be no appeal. Then in s. 50 there is this: "Every order made by a judge of the High Court in chambers, except orders made in the exercise of such discretion as aforesaid" (those are the orders just mentioned about costs by consent), "may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in court" . . . . "And no appeal shall lie from any such order to set aside or discharge which no such motion has been made unless by special leave." There again is an instance of an exceptional case, in which it was the intention of the legislature that there should be no appeal. Now, looking at those two

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sections without more I should have come to the conclusion that it was the intention of the legislature that if there was no exclusion of an appeal, then that there should be such an appeal in the nature I have mentioned, namely, the substitution of one tribunal to exercise a discretion instead of another tribunal, where there was reason to believe that that other tribunal had, in the exercise of it, made a mistake or error, or acted upon a wrong principle. But besides the Act of Parliament there are the cases of *Golding* v. *Wharton Saltworks Co.* (1); *Watson* v. *Rodwell* (2); *Davy* v. *Garrett* (3); and *Ruston* v. *Tobin* (4); and I think a perusal of these cases should bring one to the conclusion that there is an appeal given by the legislature against the exercise of a discretion; but the universal rule of this Court I should say is that such an appeal should (to use the words of the Master of the Rolls) be allowed in "only a very strong case."

In *Golding* v. *Wharton Saltworks* (1), James, L.J., in giving judgment, says: "As this is the first appeal which has come before us on a question of this kind, we desire to state the principles upon which the Court shall act in appeals of this kind. The Court of Appeal in Chancery has laid down over and over again that on a question which depends on the discretion of a judge the Court of Appeal does not in general interfere with that discretion" (undoubtedly). "Not that the Court of Appeal has not complete jurisdiction over such cases, or that the decision of the Court below would not be overruled where serious injustice would result from that decision, but as a general rule the Court of Appeal declines to interfere. Now that there is an appeal to this Court from a Common Law Division, it is more than ever desirable that this rule should be adhered to." Here the learned judge's view is that an appeal has been given, but that such appeal should be rarely allowed. Surely if that is a correct decision (and it is followed in the other decisions I have mentioned) that disposes of the first great question whether an appeal has been given by the legislature in such a case as the present, and upon the authority of this case I maintain that it has. Then comes the question as to the jurisdiction of the learned judge to

(1) 1 Q. B. D. 374.
(2) 3 Ch. D. 380.
(3) 7 Ch. D. 473.
(4) 10 Ch. D. 558.

make the order which he made. It will be only necessary to refer to the facts to understand that thoroughly. The plaintiffs have a mill lower down the stream than the defendants', and both the plaintiffs' and defendants' mills are cotton mills, and they are both driven to a certain extent by water power, and they both use the water of the same little river for their steam-engines. The plaintiffs allege that the defendants, whose mill is above, had taken more water from the stream than they ought to have done, in fact, that they had sensibly and substantially diminished its ordinary flow, and that for that they had an action—as of course they would have. And they also allege that in their operations the defendants had treated the stream unduly, and had rendered it less fit for the purpose of condensing the water in the plaintiffs' boilers than it otherwise would have been, and done substantial damage in that way. Those were the only points which had to be tried with the exception of damages. The learned judge thought it was a case which he could refer, and he said he had jurisdiction to refer it, because there were involved, or might be involved, in the inquiry a local investigation and a scientific investigation, and also because (to use the terms of the order) "a prolonged examination of documents and accounts" would be necessary. Now I do not know what sort of local investigation there would be required. There might, perhaps, be wanted an investigation or inspection of the features of the county, of the river, of the mills, of the goits and sluices, and so on. As to an examination of documents I do not see how there could be any "prolonged examination of documents" required, unless it were for the purpose of making out the title, and certainly it was not the intention of the parties to allow the jury to try, nor could the jury possibly have tried, the question of title. Then as to scientific investigation: if scientific witnesses were examined it would be to ascertain whether a substantial quantity of water had been abstracted from the stream, and how much the stream had been unduly heated, and what amount of extra heat would interfere prejudicially with condensing operations. All these matters might possibly have been investigated, but after all is it not perfectly obvious that the science, such as it was, would be very simple, and the evidence upon it would be very easily

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given? If it was a case within this section it came within it very slightly indeed, and no great time could have been occupied in going into the investigations which were necessary. If that be a correct view, then was the order a proper one to have been made? Lord Justice James in laying down the law (which I do not dispute for a moment) says that the decision of the Court below ought not to be interfered with unless serious injustice would otherwise result. Assuming, as I do now, that there may be an appeal, when ought an appeal to be allowed? It ought to be allowed in a very strong case, that is where otherwise, according to James, L.J., injustice would be done. Then is this a case where injustice has been done? Just let us consider the position in which the parties were. They were both anxious to try this case at Manchester. The jury had had a view of the spot, and knew all about it. The parties had there their witnesses, and their scientific men—if any scientific men were wanted—they had moreover furnished their counsel with briefs at very considerable expense, and all the expense incurred would be thrown away if the course were taken which Mr. Baron Pollock ordered. Therefore that being the case can any one, considering the nature of this case, come to any other conclusion than—when one question was whether a substantial quantity of water had been abstracted from the river, and when another question was whether the river had been rendered unfit for condensing purposes, simply by having some hot water thrown into it,—that the very best tribunal for trying such a case was a tribunal composed, or partly at all events composed, of persons who obtained their livelihood by manufacturing things of the kind manufactured by these mills. I cannot but think that the learned judge got rid of the best tribunal for the purposes of this trial, and chose one which, with all respect to him, was not anything like as good. Upon these grounds I have come to the conclusion that injustice was done by making this order, and that therefore this order should be set aside.

Order set aside.

Solicitors for plaintiffs: *Torr, Janeways, Torr, & Gribble.*
Solicitors for defendants: *Pritchard, Englefield, & Co.*

W. P.

[IN THE COURT OF APPEAL.]

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March 21.

THE YORK TRAMWAYS COMPANY, LIMITED *v.* WILLOWS.

Company—Allotment of Shares—Calls—Director—Estoppel.

The plaintiff company was constituted by seven persons signing the memorandum of association. Afterwards they all were summoned to attend a meeting, but only four attended, and they elected three directors. These three elected three other directors. The three original directors resigned, and afterwards one of the remaining directors sent in his resignation. The defendant then applied for fifty shares. The two remaining directors resolved that fifty shares should be allotted to the defendant, that he should be appointed a director, and that the resignation of the retiring director should be accepted. The defendant afterwards attended a meeting of the directors, confirmed the allotment to himself, and joined in passing a resolution, that the shares allotted to himself should be paid up in full forthwith. The defendant subsequently withdrew his application and refused to pay the amount of the shares allotted to him. By the articles of association the number of the directors was to be not less than three, and any casual vacancy occurring in the board might be filled up by the board, and the continuing board might act notwithstanding any vacancy in their body:—

Held, that the defendant was liable to pay the amount of the shares.

ACTION to recover from the defendant 500*l.*, being the amount due from the defendant to the plaintiffs in respect of fifty shares.

The facts of the case may be here briefly stated as follows:—

The company was registered on the 19th of December, 1878, and was constituted by seven persons subscribing the memorandum of association. At a meeting of these subscribers, held on the 22nd of June, 1879, of which all had notice, but only four attended, it was resolved that Gane, Jones, and Stephenson should be elected the first directors of the company, of whom two were to form a quorum. At a meeting of the directors held on the 25th of May, 1880, Jones and Stephenson being present, it was resolved that Fry, Heseltine, and Everitt should be directors of the company. At a meeting of the directors held on the 2nd of June, 1880, Fry and Everitt being present, a letter dated the 26th of May, 1880, was read from Stephenson, Jones, and Gane, intimating their desire to retire from their position as directors of the company, and their resignation was thereupon accepted. At a meeting of the directors, held on the 15th of September, 1880, Heseltine and Everitt being present, a letter was read from

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Fry, dated the 16th of August, resigning his seat on the board, and it was then resolved that he should be requested for the time being to defer his resignation. On the 26th of October, 1880, the defendant signed an application for fifty shares in the following terms:—

"October 26, 1880.

"To the Directors of

"The York Tramways Company, Limited.

"Gentlemen,

"I request you to allot to me fifty shares in the York Tramways Company, Limited, and agree to accept such shares when allotted to me."

At a meeting of the directors, held on the 28th of October, 1880, Heseltine and Everitt being present, it was resolved that the fifty shares applied for should be allotted to the defendant, that Fry's resignation of his seat on the board should be accepted, and that the casual vacancy thereby caused should be filled up by the election of the defendant as a director of the company. At a meeting of directors, held on the 15th of November, Everitt, Heseltine, and the defendant being present, the minutes of the previous meeting held on the 28th of October were read and confirmed, and it was resolved that shares should be allotted to various persons, and that the shares so allotted, together with the fifty shares allotted to the defendant at the meeting on the 28th of October, should be paid up in full forthwith, and that the York City and County Bank should be authorized to receive the sums to be paid in respect of these shares; and the three directors then present signed a letter to the bank-manager, with instructions to honour cheques drawn upon the account of the York Tramways Company when signed by any one of them and countersigned by the secretary.

On the 19th of November, 1880, the defendant tendered his resignation as director of the company and withdrew his application for shares.

The articles of association, so far as they are material, were as follows:—

Art. 2. "The Board" shall mean the directors for the time being or, as the case may be, a quorum of such directors assembled

at a meeting thereof, constituting a board for the transaction of business.

Art. 62. The business of the company shall be managed by the board. . . .

Art. 66. The office of any one of the board shall (subject as hereinafter mentioned) be vacated, if he delivers to the board or to the secretary a notice in writing of his resignation of his office of director . . . . provided that there shall be a resolution of the board to the effect that such vacation of office shall take place, in passing or not passing which resolution the board shall have full discretion.

Art. 68. The number of the board shall not be less than three nor more than seven.

Art. 69. No person, except the first directors, and such persons as may be appointed by them under the next clause, shall be qualified to be a director, who is not the registered holder of shares in the company of the nominal value of 100*l*., and who has not been the holder of such shares for at least three months.

Art. 70. The first directors shall be determined by the subscribers to the memorandum of association. Until directors are appointed, the subscribers to the memorandum of association of the company shall be the directors of the company. The first directors shall have power to add to their number any other person or persons at any time before the third ordinary general meeting, but so that the total number of the board shall not at any time exceed seven. The first board and those who may be added to their number as in the present clause provided shall continue in office, unless they die or resign or become disqualified, until the third ordinary general meeting. . . .

Art. 72. Any casual vacancy occurring in the board may be filled up by the board. The continuing board may act, notwithstanding any vacancy in their body.

Art. 74. The board may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. . . . .

Art. 76. The board shall cause minutes to be made in books provided for the purpose, of the following matters, namely: of all

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appointments of officers, servants, and sub-committees made by the board; of the names of the persons present at every meeting of the board, and of all orders, resolutions, and proceedings of all general meetings and of the board. All acts done by a meeting of the board, or by any person acting as one of the board, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any of the board, or of such person acting as aforesaid, or that they or any of them were or was disqualified, or had in any way vacated their or his office, be as valid as if every such person had been duly appointed and was duly qualified.

The action was tried without a jury before Manisty, J., who delivered the following judgment.

MANISTY, J. It is all-important in this case to bear in mind, and to get into consecutive order, the proceedings of this company, which from the beginning to the end seem to have been conducted in a most irregular manner. I may observe, on starting, that the defendant appears to have no merits in his favour, his objections are purely technical, and it is no doubt an attempt to get out of a liability into which he entered with a perfect knowledge of what he was doing.

The articles of association of the plaintiff company must govern my decision, and I shall have to refer to them frequently in the course of my judgment. There were seven subscribers to the memorandum of association, and by the articles of association the first directors were to be appointed by those subscribers. Notice of a meeting was given to all the subscribers, but at the meeting, which was held upon the 22nd of June, 1879, only four were present, and those four appointed three directors, Jones, Gane, and Stephenson, and these were three of their own body. I do not intend to express any opinion upon the validity of that appointment. The inclination of my opinion is that it was a good appointment, and I will assume it to be good for the purposes of this case. In my opinion these three, Jones, Gane, and Stevenson, were the "first directors" within the meaning of the sixty-ninth and seventieth articles, and having power to add to their number by virtue of the seventieth article, on the 25th

of May, 1880, they did add to their number. Whether this was a valid election, I do not decide; but for the purposes of this case I will assume it to have been a valid election. There were only two directors present, Jones and Stephenson, and they elected three new directors, Fry, Heseltine, and Everitt. If the meeting at which they were elected was properly convened and constituted, Fry, Heseltine, and Everitt were appointed by the first directors, and did not need any qualification. Therefore, on the 25th of May, 1880, a board of six members was constituted. It is evident, however, that the intention was that the board should not continue to be constituted of six members, because on the following day, the 26th of May, all the three who had been elected by the subscribers to the memorandum of association, namely, Gane, Jones, and Stephenson, resigned. On the 26th of May the board was reduced to the number of three directors, and it appears to have continued down to the month of August. By the sixty-second of the articles of association, the business of the company is to be managed by the board, and by the sixty-eighth article the number of the board is to be not less than three nor more than seven. Power is given to the board to determine the quorum necessary, but I must take it, for the purposes of this case, that no resolution was ever passed determining the number of the quorum. It may have been determined at a meeting of the subscribers to the memorandum of association that there should be a quorum, but that is immaterial; for it was necessary that the board should determine the quorum. The company continued to transact business with apparently only two directors, although there were in truth three directors, Fry, Heseltine, and Everitt. Of these, Fry resigned on the 16th of August, but his resignation was not accepted until the 28th of October. The other two directors had a meeting on the 15th of September, and on the 5th of October, after the resignation of Fry, appear to have transacted most important business of the company, by making a contract of upwards of 8000*l.* for the construction of works, and by allotting 810 shares. This seems to me a most unsatisfactory mode of conducting the business, and whilst matters stood in this condition, the important events for this action occurred. In October the defendant applied for fifty shares, and on the 28th, only two

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directors, Heseltine and Everitt, being present, they accepted Fry's resignation, and allotted fifty shares to the defendant, and they elected him a director. This brings me to the meaning of the seventy-second of the articles of association, and I think that the proper construction of that article is, that any casual vacancy occurring in the board may be filled up by the board, and the continuing board may act in this respect, that is, for filling up the vacancy, notwithstanding any vacancy happening in their body. This seems to me a sensible and a proper construction; if a different construction were adopted, a board of two might transact all the business of the company, notwithstanding the sixty-eighth article, which provides that the board shall be of not less than three members, and the important provisions with respect to the management of the business of the company would be rendered null and void. If that be the right construction, there was a vacancy in the number of the board, and I will assume that it was a "casual vacancy" within the meaning of the articles, and that the remaining members of the board might fill up that vacancy; that would not, in my opinion, entitle the two directors to transact the business of the company by disposing of shares and by making contracts; the two directors must fill up the vacancy, and then the board of directors would again be not less than three, and might carry on the business and transact the affairs of the company. If this is correct, what was the position of the defendant as regards qualification on the 28th of October? He was elected, but he was not qualified, because he was not, I think, either one of the first directors, or one of those appointed by the first, and therefore he could not be elected unless he was qualified. If I am right in the construction of the seventy-second article, the two directors, Heseltine and Everitt, could not allot the shares on the 28th of October.

But it has been contended for the plaintiffs that even if that is so, a meeting was held on the 15th of November, and that three directors were then present, Everitt, Heseltine, and the defendant. Whether three directors were present at the meeting depends upon this, whether or not the defendant was a director. If he was a director, I should be inclined to hold, both upon the authorities and upon principle, that the confirmation of the allot-

ment made on the 28th of October was the same as an original allotment. Then, was the defendant a director? It has been contended that by virtue of the Companies Act, 1862, s. 67, the fact, that he was not qualified as a director, is immaterial, and that the acts done by him are valid, and I have entertained some doubt whether it lies in his mouth to say that he was not qualified as a director, and that the allotment on the 28th of October which was confirmed on the 15th of November was void. If it was void altogether, of course ratification would not make it good. But if what took place on the 15th of November is to be treated as an original allotment, then the question of ratification and confirmation is of course out of the question; and it seems to me that the allotment in October must be struck out and treated as a nullity, and then the only question is, what is the effect of the acts done on the 15th of November? The directors present confirmed the allotment made on the 28th of October. In my opinion that was tantamount to an original allotment, and they then resolved that shares should be allotted to various persons, and that the shares so allotted, together with the fifty shares allotted to the defendant at the last meeting, should be paid up in full forthwith, and that the York City and County Bank should be authorized to receive the sums to be paid in respect of those shares; and the three directors then present signed a letter to the bank manager with instructions to honour cheques drawn upon the account of the York Tramways Company, when signed by any one of them and countersigned by the secretary. There is no doubt that the defendant did act as a director by becoming a party to the resolution and by signing the letter to the bank. Whatever objections may be taken by other persons to his appointment, I have come to the conclusion that under those circumstances he is liable, and that he cannot be heard to say that the allotment was not made: he sent an application in writing, he accepted the allotment, and he became a party to the resolution by which he was to pay up the shares in full. I therefore give judgment for the plaintiffs.

J. E. H.

The defendant appealed.

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March 20, 21. *Murphy, Q.C.*, and *Edwyn Jones*, for the defendant. Two questions arise in this case: first, was the allotment to the defendant valid? and secondly, is he estopped from denying his liability on the shares by having acted as a director?

As to the first point, Article 62 provides that the business of the company shall be managed by the board, and Article 68 provides that the board shall consist of not less than three members: but on the 28th of October, when the shares were allotted to the defendant, only two directors were present and acted: and this is sufficient to avoid the allotment: *In re Alma Spinning Co.* (*Bottomley's Case*) (1).

[BRETT, L.J., referred to *Re Phosphate of Lime Co.* (*Austin's Case*). (2)]

It is submitted that the decision in that case was erroneous, and ought not to be followed in the Court of Appeal. The authorities cited in 1 Lindley on Partnership, bk. ii. ch. i. s. 2, p. 244 (4th ed.), shew that the acts of directors, when they are less than the minimum number, are invalid. There was no lawful quorum, and the two remaining directors could not act. The defendant was not qualified to sit as a director, for he was not one of the first directors, and he had not held his shares for three months at the time of his appointment. Moreover, the appointment of the original directors was invalid, because the full number of subscribers to the memorandum of association was not present: *Howbeach Coal Co.* v. *Teague.* (3)

As to the second point, it is plain that the defendant is not estopped from denying his liability by having acted as director. *Howbeach Coal Co.* v. *Teague* (3) is an authority also as to this point.

Willis, Q.C., and *Horne Payne*, for the plaintiffs. The appointment of the defendant as a director cannot now be questioned, there having been no fraud in his election: *Murray* v. *Bush.* (4) A mere change in the constitution of a board of directors will not render an allotment invalid: *Hallows* v. *Fernie.* (5) As to the

(1) 16 Ch. D. 681.
(2) 24 L. T. (N.S.) 932.
(3) 5 H. & N. 151; 29 L. J. (Ex.) 137.
(4) Law Rep. 6 H. L. 37.
(5) Law Rep. 3 Ch. 467.

question of estoppel, the defendant, having acted as a director, cannot now be heard to say that he is not liable in respect of the number of shares for which he had applied.

Murphy, Q.C., in reply. The specified number of directors must be rigidly adhered to: 1 Lindley on Partnership, bk. 3, ch. 1, s. 2, p. 542 (4th ed.). In the present case the plaintiffs are suing in their own name and must be treated as a going concern, and this circumstance distinguishes the present case from *In re Great Oceanic Telegraph Co., Harward's Case* (1) and *In re British and American Telegraph Co., Fowler's Case* (2); for in those cases the companies had been ordered to be wound up, and the question to be determined was who were liable to the creditors of the insolvent companies. At the meeting of the 15th of November only two directors existed, and the defendant could not confirm an allotment to himself.

LORD COLERIDGE, C.J. A great many points have been argued in this case; but, on the whole, I am of opinion that the judgment of Manisty, J., was right and ought to be affirmed.

The plaintiffs bring this action against the defendant for a call, and the defendant alleges by way of defence that no allotment of shares has been made to him. In order to ascertain whether an allotment has been made, we must examine the facts and the constitution of the company; it will render matters clearer to take the facts first.

Some time before the alleged allotment of shares to the defendant the company was constituted by signing the memorandum of association; at a meeting of the subscribers to which all were summoned, but which only four attended, three directors were appointed, and they appointed three others. This brought up the number of directors to six. The three original directors resigned, and therefore three only were left. One of these tendered his resignation some time before the 28th of October, but no act was done until that day. Upon the 26th of October the defendant applied for shares, and upon the 28th of October the two remaining directors resolved that fifty shares should be

(1) Law Rep. 13 Eq. 30. (2) Law Rep. 14 Eq. 316.

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allotted to the defendant, and that he should be appointed a director, and ultimately that the resignation of Fry, the retiring director, should be accepted. I am not prepared to say whether for a few minutes there were four directors of the company; and it is immaterial to consider whether Fry continued to be a director until the end of the meeting; for the defendant did not become a director until the shares were allotted to him, and in either view the allotment was made to the defendant by two directors only. Having been elected a director, he attended a meeting subsequently held; he then confirmed the allotment to himself, he concurred in an order made upon the company's bankers, and agreed to a certain mode of raising money for the company's benefit. The defendant therefore acted as a director, and joined in these proceedings as a member of the board. These circumstances having taken place in October and November, the defendant afterwards withdrew his application for shares, and refused to pay the amount of the call made in respect of them.

I will next proceed to consider the constitution of the company, for the question being whether an action lies to recover this call, it is necessary to ascertain whether it was good and well founded in point of law. The memorandum and the articles of association are before us, and I assume that the counsel for the parties have drawn our attention to what is material. The 2nd article provides that the "board," that is, the board for the transaction of business for the company, shall consist of the directors. By the 62nd article the business shall be managed by the board. By the 68th article the number of members upon the board is not to be less than three nor more than seven. The 69th article deals with the qualification of directors, and no person without a qualification shall be a director. By the 70th article the subscribers to the memorandum of association shall be the first directors, and shall have power to add to their number. The expression "first board" seems to shew that no previous board had existed. By the 72nd article any casual vacancy may be filled up by the board. "Any casual vacancy" means any vacancy not occurring by effluxion of time, that is, any vacancy occurring by death, resignation, or bankruptcy. In the event

of a casual vacancy the continuing board may act. If Fry's resignation created a casual vacancy, in my opinion the two remaining members of the board might act. Upon the true construction of the articles I think that no quorum was ever legally constituted under the 74th article, because by force of the 70th article the board cannot come into existence until after the appointment of the directors, and the board did not exist when the quorum was appointed. The plaintiffs cannot rely upon this point. But how does the matter stand in other respects? I think that the board still consisted of three directors, because Fry's resignation had not been accepted when the defendant applied for shares; but I will assume that there were only two directors. It has been argued that the proceedings as to the allotment made to the defendant were invalid, and that there being no quorum the board could not act. But if there were three directors, the two acted as the majority of the board. If there were two directors only, the two were acting during a casual vacancy. The board does not come to an end because a casual vacancy occurs. If any other construction were adopted than that which I have put upon these articles, a board of three directors must cease to exist upon the accidental death of one of its members, and the whole affairs of the company must come to a standstill. I do not see any reason to drive me to that conclusion. I will consider the contention that the resignation of Fry did not create a vacancy until it was accepted. Even according to that view the defendant cannot escape from liability, for the board must act by a majority; and until Fry's resignation was accepted the board did act by a majority, and did by a majority allot these shares to the defendant. These considerations are sufficient to dispose of the case and to shew that the defendant must pay the amount of the call upon his shares. But although I think the first allotment good, I wish to remark that the defendant subsequently recognised the allotment and agreed to pay for the shares. What took place at the meeting in November, was a good allotment and a good acceptance. These would bind him equally with the transactions upon the 28th of October. It has been contended that the defendant was not duly qualified to act as a director. I think that he did not require a qualification; he was appointed by the

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first directors, and therefore he fell within the provisions of the 69th article, which rendered it unnecessary for him to possess a qualification. Even if this were not so, he was within 25 & 26 Vict. c. 89, s. 67, which is substantially the same with a previous enactment, and he fell also within the latter half of the 76th article. These provisions are equally applicable, and render valid whatever acts have been done by the defendant as director. The absence of a qualification as director is immaterial. It has been contended that the supposed defect in the appointment of the defendant as a director has not been "afterwards discovered," within the meaning of the 76th article and of 25 & 26 Vict. c. 89, s. 67, and reliance has been placed upon the authority of Lord Chelmsford in *Murray* v. *Bush*. (1) But in that case Lord Cairns (pp. 69, 70), and Lord Hatherley (pp. 76, 77), dissented from the view of Lord Chelmsford. The question material to the present case was as to the true construction of 7 & 8 Vict. c. 110, s. 30, which, as I have already intimated, is substantially the same with 25 & 26 Vict. c. 89, s. 67. I feel myself bound to follow the opinions of Lord Cairns and Lord Hatherley, for the decisions of the House of Lords are technically binding upon us; and there being a difference in the views of the Peers present, the judgment of the House was given according to the opinions of the two Lords whom I have last mentioned. This gets rid of the question of disqualification. The only remaining question argued before us is whether, if he had not been properly appointed a director, he was estopped from setting up that defence. Two cases have been cited during the argument as bearing upon this question, *In re Great Oceanic Telegraph Co., Harward's Case* (2), before Malins, V.C., and *In re British and American Telegraph Co., Fowler's Case* (3), before Bacon, V.C. These cases, especially that before Malins, V.C., are very much in point. The judges who decided them would have held that an estoppel existed in the present case, and that the defendant could not deny his liability as a director. I think that even without the opinions of these learned persons I should have held that there was an estoppel; however, it is unnecessary for me to express any opinion, and I

(1) Law Rep. 6 H. L. 37, at p. 53. (2) Law Rep 13 Eq. 30.
(3) Law Rep. 14 Eq. 316.

need only say that as to estoppel I am not prepared to differ from Manisty, J. But I prefer to rest my decision upon the other grounds which I have mentioned.

It remains only to consider whether our decision conflicts with the authorities cited to us: it is easy to produce authorities in which somewhat similar questions have been raised, but when they have been examined, they are found not to have been decided upon the same governing words, and none of the authorities cited can be considered as guides for our decision. In *Howbeach Coal Co.* v. *Teague* (1) the directors never had been lawfully appointed, and there was no proper quorum: the minority of the subscribers to the memorandum of association could not bind the shareholders: the body making the call was incompetent. In the case before us, for the reasons which I have given, it seems to me that a number of directors competent to make a call existed. In the case of *In re Alma Spinning Co., Bottomley's Case* (2), a proper number of directors had been appointed; but this number had been reduced by death and insolvency, and the vacancies had not been filled up; and Jessel, M.R., as it seems to me, properly held that the number of directors having been reduced below the lawful number, they could not bind the shareholders by their acts. I am unable to agree with the view taken by Jessel, M.R., of *Kirk* v. *Bell* (3): the judges of the Court of Queen's Bench there proceeded upon a different ground, and they decided that there was not a quorum competent to transact the extraordinary business of the company. In my view *Kirk* v. *Bell* (3) and *In re Alma Spinning Co., Bottomley's Case* (2) are not in point for our decision. Before I conclude, I may point out that some of the reasons given by me derive great support from *Thames Haven Dock and Railway Co.* v. *Rose.* (4) That case shews that the business of the company does not come to a standstill because the proper number of directors does not exist. I am aware that that case is different from the case before us in its facts, but the judges of the Court of Common Pleas overruled the cogent argument addressed to them, and some of them at least were of opinion that the enactment as to the number of directors was directory only.

(1) 5 H. & N. 161; 29 L. J. (Ex.) 137.
(2) 16 Ch. D. 681.
(3) 16 Q. B. 290.
(4) 4 Man. & G. 552.

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I have found it necessary to consider the case at length; but for the reasons which I have given, I think that Manisty, J., was right.

BRETT, L.J. I will shortly go through the facts and the arguments in the case, in order to shew that I agree entirely with the Lord Chief Justice.

This is an action to recover the amount of a call made upon shares; and it has been contended for the defendant that no valid allotment of shares was made to him, and many objections have been urged as to the proceedings of the company. It has been argued that the directors, Haseltine, Everitt, and Fry, were not duly appointed, and if the facts had been the same as in *Howbeach Coal Co.* v. *Teague* (1), it would have been necessary for us to consider whether that case could be supported: but in that case only three of the subscribers to the memorandum of association appointed the directors, whereas in the case before us four of the subscribers elected three directors, and the others were elected by these three: the directors therefore were elected by a majority of the subscribers: and I know of no rule of law preventing the majority of a body from binding the minority. It may be said that the appointment of Hazeltine, Everitt, and Fry was invalid, unless they had a qualification; but I think that they were added to the number of "first" directors within the meaning of the 69th of the articles of association, and that they did not need any qualification. It has been further contended that on the 28th of October only two directors existed. I agree that no valid quorum had been appointed, and that there was no power to act by a quorum: but if the board consisted of three members, two of them, being the majority, might act; for the articles of association direct that the board shall consist of not less than three directors, and that the business of the company shall be transacted by the board, and I think it sufficient that the majority acted. Then Fry's resignation created a casual vacancy within the meaning of the 72nd article, and it was lawful for the continuing board to act until the proper number of the board should be filled up. This circumstance makes a difference between the

(1) 5 H. & N. 151; 29 L. J. (Ex.) 137.

present case and all the others cited before us, in which the powers of boards of directors have been discussed. Moreover the defendant was present at the meeting in November, and it seems to me that what then happened was sufficient to bind him. Suppose that he had made no application for shares; what then took place was equivalent to an allotment to, and an acceptance by, the defendant of the shares. He joined in the allotment to himself. It has been argued that is insufficient, because at the meeting in November only two directors of the company existed, if the defendant had not previously become a director, and the two directors were insufficient to appoint a third; but I think that this objection is disposed of by the same reasoning as I have already used against the other objections urged on behalf of the defendant. But I will assume that the defendant was not qualified to be a director, and that he did not accept the shares at the meeting in November: nevertheless he acted as a director, and did so bonâ fide and with the intention of discharging the duties of a director. Under this state of circumstances I think that the reasoning of Lord Cairns in *Murray* v. *Bush* (1) applies. I prefer to follow the doctrine laid down by him rather than that laid down by Lord Chelmsford in the same case. I think that the defendant was bound by his acting as director: in this point of view also it must be taken that he joined in the allotment to himself, and I think that he is estopped from denying his liability. I feel more strongly upon this point than the Lord Chief Justice appears to do. As to this question, and with regard to the cases cited before us, I wish to say that I am unable to agree with *Howbeach Coal Co.* v. *Teague* (2), but I agree with *In re Great Oceanic Telegraph Co., Harward's Case* (3) and *In re British and American Telegraph Co., Fowler's Case* (4); these cases shew that the defendant must be taken to have allotted to himself and to have accepted the shares. The facts fall within the ordinary rule of estoppel, and the defendant cannot be allowed to say either that the shares were not allotted to him, or that he did not accept them.

(1) Law Rep. 6 H. L. C. 37, at pp. 69, 70.
(2) 5 H. & N. 151; 29 L. J. (Ex.) 137.
(3) Law Rep. 13 Eq. 30.
(4) Law Rep. 14 Eq. 316.

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Upon all the grounds which have been argued before us, the appeal must be dismissed.

HOLKER, L.J. After the elaborate judgment delivered by the Lord Chief Justice, and after the remarks of Brett, L.J., I do not propose to go into the facts. I wish, however, to make a few observations as to the power of the board of directors to act by a majority. Upon turning to the articles of association, I find by the 2nd that "board" means the directors assembled for the transaction of business: by the 62nd "the business of the company shall be managed by the board": by the 68th "the number of the board shall not be less than three nor more than seven." It is said that when the board consists of three members, it is sufficient if the majority act on behalf of the board. In my opinion the better view is that the articles of association direct that the business of the company shall be managed by not less than three directors, and that the shares must not be allotted by less than three. I think that the business of the company cannot be said to be managed by the minimum number allowed by the articles, when one person is absent; it would not then be a board of three.

In all the other reasons of the Lord Chief Justice and Brett, L.J., I substantially concur.

Appeal dismissed.

Solicitors for plaintiffs: *Best, Webb, & Templeton.*
Solicitor for defendant: *A. C. Spaull.*

J. E. H.

[IN THE COURT OF APPEAL.]

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May 30.

SCHNEIDER *v.* BATT & CO. PANWELS (THIRD PARTY.)

Practice—Third Party—Directions as to mode of having Questions in Action Determined—Refusal of Court to order one Trial—Dismissal of Third Party from Action—Rules of Supreme Court, 1875, *Order XVI., Rules* 18, 21.

The plaintiff having sued for breach of contract in respect of goods, the defendants, under the Rules of the Supreme Court, 1875, Order XVI., Rule 18, brought in as a third party P. from whom they themselves had bought the goods. The defendants afterwards under Order XVI., Rule 21, applied for directions as to the mode of having the questions in the action determined; but the Court refused to give any directions. The defendants delivered a claim to the third party who in turn delivered to them a defence. The action having been tried between the plaintiff and the defendants, the latter delivered a reply to the third party, and gave notice of trial:—

Held, that the reply and notice of trial must be set aside, for it must be taken that the action came to an end as regarded the third party, when the Court refused to give directions.

ACTION for breach of contract.

By the claim, dated the 5th of July, 1880, the plaintiff alleged that on or about the 10th day of January, 1880, it was agreed in writing between the plaintiff and the defendants that the defendants should sell and deliver to the plaintiff, and that the plaintiff should buy and accept from the defendants seventy-five tons Belgian nail rods to be delivered free on board at Antwerp, of the quality, kind, and description known as No. 1 Belgian Nail-rods "Lion Belge," at the price of 7*l.* 12*s.* 6*d.* per ton, at 2 per cent. discount for cash, against the mate's receipt or bill of lading at Antwerp; but that the defendants shipped and offered to deliver to the plaintiff nail-rods that were not of the said quality, kind and description, and were of an inferior quality, and were wholly different in kind and description, and were also unmerchantable, whereby the plaintiff lost the price which he had paid, and the profits, and incurred expenses. In the alternative the plaintiff sued for a breach of warranty in respect of the nail-rods, and also sought to recover the price paid by him as money received to his use.

By the defence, dated the 21st of July, 1880, the defendants

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alleged that they did deliver to the plaintiff nail-rods of the agreed quality and description, and they denied that the nail-rods delivered by them to the plaintiff were unmerchantable. They denied the warranty and also the breach thereof, and they further denied that they were indebted to the plaintiff for the price of the nail-rods.

By the reply dated the 7th of August, 1880, the plaintiff joined issue.

The defendants by a notice issued under Rules of the Supreme Court, 1875, Order XVI., Rule 18, brought in F. S. Panwels (from whom they had bought the nail-rods) as a third party to the action. During Michaelmas Sittings, 1880, they applied to the Queen's Bench Division for directions under Order XVI., Rule 21; that Court reserved judgment, but directed that pleadings should be delivered between the defendants and the third party.

Accordingly, by a claim, dated the 6th of December, 1880, the defendants alleged that in the month of January, 1880, they agreed to buy and accept of the third party, and the third party agreed to sell and deliver to the defendants, 500 tons of Belgian nail-rods of the quality, kind, and description known as No. 1 Nail-rods "Lion Belge," to be delivered free on board at Antwerp; but that although the third party did deliver to the defendants nail-rods in pretended performance of the said agreement, he delivered to them nail-rods of a different inferior quality, kind, and description, and unmerchantable. The defendants further alleged that at the time of making the said agreement with them the third party knew that the defendants bought the nail-rods to sell again; the defendants did sell seventy-five tons of the nail-rods to the plaintiff, and delivered the same to him; after the sale and payment of the price by the plaintiff, he repudiated and refused to be bound by the sale on the ground that the nail-rods were of inferior quality, kind, and description, and unmerchantable, and sought to recover in this action the price paid for the same by him. The defendants claimed damages and to be indemnified by the third party in respect of the claim of the plaintiff, in so far as the same related to the quality, kind, and description of the nail-rods.

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By his defence, dated the 10th of December, 1880, the third party denied the breach of the agreement and that the nail-rods were unmerchantable. The third party alleged that he had no notice what the defendants intended to do with the nail-rods.

The Queen's Bench Division, on the 16th of December, delivered judgment, refusing to give directions under Order XVI., Rule 21, on the ground that the plaintiff might be embarrassed and delayed in the prosecution of the action if the third party should apply to send out a commission to Belgium, and also on the ground that the defendants had written a letter which would render the action undefended as against the plaintiff, but which would be no evidence against the third party. The Court of Appeal on the 18th of December, affirmed the judgment.

By their reply, dated the 21st of April, 1881, the defendants joined issue upon the defence of the third party; they also gave notice of trial. The action between the plaintiff and the defendants having been tried, the third party took out a summons to set aside the reply and notice of trial. An order having been made in the terms of the summons, the Queen's Bench Division affirmed it.

The defendants appealed.

May 18, 19. *Sir F. Herschell, S.G.*, and *Crump*, for the defendants. A question remains to be determined between the defendants and the third party, and that question ought to be tried under the powers of the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 3. It follows from *The Cartsburn* (1) that the action did not come to an end as regarded the third party by the trial between the plaintiff and the defendants. The rules contained in Order XVI. cannot limit the operation of the statute. The common question between the parties was whether the iron was according to contract, and the defendants ought to be at liberty to try this in the present action.

Grantham, Q.C., and *Bray*, for the third party. The action cannot go on against the third party; for it has come to an end, and final judgment has been signed as between the plaintiff and the defendants.

[BRETT, L.J. The steps in the action appear to have been

(1) 5 P. D. 59.

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misconceived. The proceedings ought to have been taken under Order XVI., rule 17, and not under rule 18.]

The proceedings against the third party do not constitute a second action; the action is at an end, although there is no judgment against the third party. The defendants are attempting to bring into the action matter which is irrelevant to the issue between them and the plaintiff; and this is contrary to the intention of the rules. In *Padwick* v. *Scott* (1) Hall, V.C., said that the Judicature Act, 1873, s. 24, sub-s. 3, "does not enlarge the procedure so as to bring into the particular litigation other matters which could not, according to the settled practice of the Court, have been litigated therein." *Benecke* v. *Frost* (2) does not assist the case for the defendants. The pleadings between the defendants and the third party were delivered only as a matter of form.

Sir F. Herschell, S.G., in reply. The language of the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 3, is wide enough to give the defendants relief; the Rules of Court cannot vary the effect of the statute.

[BRETT, L.J. The object of the statute and rules was that one trial should be had. Upon the true construction of them I incline to think that they contain no compulsory provisions as to procedure against a third party.]

The Court can give directions by virtue of Order XVI., rule 21. A defendant may be compelled to deliver a statement of claim to the third party; if he does not proceed with proper expedition, the third party may take out a summons to dismiss the proceedings against him. The plaintiff can give notice of trial as against the defendants, and the defendants as against the third party. The object of the legislature was that a defendant sued for the default of a third person should have speedy relief.

[COTTON, L.J. In the Judicature Act, 1873, s. 24, sub-s. 3, the words used are that the Court "shall have power to grant." In some of the other sub-sections the words used are "shall give," or "shall recognise." Does not the change of language shew a change of intention, and does it not confer a discretion?]

Cur. adv. vult.

(1) 2 Ch. D. 736, at p. 742. (2) 1 Q. B. D. 419.

May 30. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

BRAMWELL, L.J. We all are of opinion that the judgment must be affirmed. The notice was originally given under Order XVI., rule 18, and, speaking for myself only, I think that if this case does not fall within that rule the third party ought to have been dismissed; he ought not to have been brought in under one rule and dealt with under another; and certainly at the time when the notice was given, the facts shewed that the case was one to which rule 17 properly applied. We decide, however, this case on a different ground, and we will assume that the third party was brought in under the proper rule. The object of the rule appears to be that when the same question exists between several persons, that question shall be tried once for all. For instance, when the action is for breach of contract in the sale of goods, and the defendant alleges that if the breach of contract exists, it is by the default of some third person, an order may be made that the questions existing in common between the parties shall be tried in one proceeding. That, we think, was the intention of the rule. Accordingly, when this Court determined that the questions between the parties should not be tried once for all, the reasons for bringing in the third party came to an end, and he ought then to have been dismissed from the action. When this Court had determined that no question in common should be tried between the parties, no further proceeding ought to have been taken by the defendants against the third party. It has been argued that the Rules of Court cannot limit the operation of the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 3; but the rules have received a parliamentary sanction. It may be granted that the rules ought not to be construed so as to contravene the provisions of the statute; but it is to be recollected that s. 24, sub-s. 3, is permissive, and not obligatory; and if it is a matter for our discretion, whether the proceedings against the third party should be continued, we certainly think that they ought not to be allowed to go on.

I wish to say a few words as to the statement of claim delivered by the defendants to the third party, and as to the defence delivered by the third party to the defendants. We have been

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informed by the counsel for the third party that they were delivered only pro formâ, and I think that we must treat the case as if these pleadings had never passed between the parties. But at all events, as can be seen from the dates, at the time when the statements of claim and defence respectively were delivered, it had not been determined that there should not be one trial for all the matters in dispute, and therefore the ground did not then exist upon which we now give judgment.

Appeal dismissed.

Solicitors for defendants: *William A. Crump & Son.*
Solicitors for third party: *Hill, Son, & Rickards.*

J. E. H.

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March 11.

[CROWN CASE RESERVED.]

THE QUEEN *v.* NEWMAN.

Larceny—Misappropriation of Property intrusted for safe Custody—Larceny Act (24 & 25 *Vict. c.* 96), *ss.* 75, 76.

N., a solicitor, was intrusted by a client with money to invest on mortgage on the client's behalf, he, instead of so doing, fraudulently appropriated the money to his own use:—

Held, by Lord Coleridge, C.J., Denman, Stephen, Mathew, and Cave, JJ., that N. was not intrusted with such money for "safe custody" within s. 76 of 24 & 25 Vict. c. 96 (the Larceny Act).

THE prisoner in this case was a solicitor of Southampton, and was found guilty before Bowen, J., at the Winchester Assizes, of an alleged offence against s. 76 of 24 & 25 Vict. c. 96. The indictment charged that he being an attorney and being intrusted with the property of another person "for safe custody" did, with intent to defraud, convert and appropriate the same to his own use. It appeared that at various times during the lifetime of one Thomas Dawkins, since deceased, the prisoner had been intrusted with divers sums of money from Dawkins as his solicitor, in order that the prisoner might lay out and invest the same on mortgages on behalf of Dawkins. The prisoner always subsequently represented that he had acted according to his instructions, and that

the proper mortgages had been duly effected from time to time, and that the moneys intrusted to him were outstanding upon such mortgages, and from time to time the prisoner paid over to Dawkins divers sums as and for interest supposed to be received by the prisoner from the various supposed mortgagors. It was discovered, however, after the death of Dawkins, by the trustees and executors under his will, and it was established in evidence at the trial that the mortgages were wholly fictitious, and non-existent, and that the prisoner instead of investing the money intrusted to him upon any such mortgages, had fraudulently and improperly appropriated the money to his own use.

The learned counsel for the prisoner at the close of the case for the prosecution, submitted that there was no evidence of any offence having been committed as laid in the indictment, and that money intrusted to the prisoner to lay out on mortgages was not properly intrusted to him for "safe custody" under s. 76 of 24 & 25 Vict. c. 96. The learned counsel cited *Reg.* v. *Cooper* (1); *Reg.* v. *Fullagar.* (2) Bowen, J., said he would express no opinion on the point, but would reserve it for this Court, but for the purposes of the day he should direct, and accordingly did direct the jury, that if they were satisfied that money was intrusted to the prisoner to be invested on mortgage, and to be kept safely in his own hands till such mortgage was effected by him, and if, instead of investing the money so intrusted to him, he converted it fraudulently to his own use they should find the prisoner guilty. The jury accordingly found the prisoner guilty, and the learned judge reserved for the opinion of this Court, whether his direction was correct in law, stating that if it was, the prisoner was rightly convicted, whilst if it was not the conviction ought to be quashed.

B. Coleridge for the prisoner. The charge is made under s. 76 of 24 & 25 Vict. c. 96, which treats only of property, including, as appears by the definition given in the statute, money intrusted for "safe custody." The earlier section, s. 75, deals with misappropriation of money intrusted for investment or for any particular purpose, and requires a written direction to be proved, and in a subsequent portion deals with certain frauds as to

(1) Law Rep. 2 C. C. R. 123; 43 L. J. (M.C.) 89.

(2) 41 L. T. (N.S.) 448; 14 Cox, C. C. 370.

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chattels and valuable securities, but as to them requiring no written direction. Sect. 76 requires no written direction to be proved, but deals with, inter alia, money intrusted for safe custody, as distinguished from investment. So that if the money is intrusted for investment a written direction is required, if for safe custody it is not required. The legislature thus clearly distinguishes the case of money intrusted for investment from that intrusted for safe custody, and cannot have intended money intrusted for investment to be regarded as money intrusted for safe custody until investment in all cases, whether there was or was not any express or additional contract as to the custody until investment.

[CAVE, J. Sect. 76 requires an intent to defraud to appear, whilst s. 75 deals with violations of good faith and acts contrary to the intrusting, there is that distinction in the wording of the sections also.]

Yes. It tends to shew that the misapplication of money intrusted for investment, including the necessary keeping of it till investment, is distinguished from money intrusted merely for safe custody, as in a box. These sections were considered in *Reg.* v. *Cooper*. (1) In that case the solicitor charged received money which he ought to have invested, but which he instead in part misappropriated, and there, as much as here, it might have been, and indeed seems to have been, contended that the accused had the money for safe custody till investment, yet the Court held the 76th section was clearly out of question, that the money was really intrusted for investment and not safe custody. It is intrusted for safe custody only when it is contrary to the recipient's duty to part with the money intrusted. The terms are exclusive, when money is for investment it is not for safe custody.

[DENMAN, J. May not a person have to hold the money for a week and then invest, and would he not for the week have it for safe custody ?]

Such an arrangement is not shewn by any evidence to have been made in the present case.

In *Reg.* v. *Fullagar* (2) the indictment was under both sections, and as it is put by Hawkins, J., if the solicitor charged there was intrusted with the money for investment it was by letters, and

(1) Law Rep. 2 C. C. R. 123. (2) 41 L. T. (N.S.) 448.

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therefore there was a direction in writing, whilst if the letters did not amount to a direction to invest, then he had the money for safe custody.

E. U. Bullen (*Tickell*, with him). The prisoner had the money for safe custody until investment, the jury have so found, and there is really nothing reserved, their finding disposes of the matter. The direction was as matter of law clearly right, and there is nothing reserved as to how far the evidence supported the finding.

[LORD COLERIDGE, C.J. The direction is expressed to be for the purposes of the day only. The point is, was it on the facts the proper direction.

CAVE, J. The difficulty is, there is no evidence to shew that the money was not to be invested at once.]

In *Reg.* v. *Cooper* (1) there was no particular sum that the prosecutor could call his own, whilst here there is a direct handing to him of the property. In all cases of solicitor and client the solicitor holds for safe custody until investment. *Reg.* v. *Fullagar* (2) is a similar case to the present. That the money was paid to the prisoner by a mortgagor who was paying off a mortgage, and not by his client, is hardly a substantial difference; the receipt is as agent of the client, the contract, whether for custody, or investment, or both, is with the client. It is the client who intrusts the money.

Coleridge replied.

Cur. adv. vult.

March 11. LORD COLERIDGE, C.J. In this case we are called upon to determine the true construction of s. 76 of 24 & 25 Vict. c. 96, a section which, preceded by one other section, is to be found in that statute under the heading of "As to Frauds by Agents, Bankers, or Factors." The question which is left to us is substantially whether the facts in this case are such as to bring the prisoner within the provisions of s. 76. I think the facts do not so bring the prisoner within that section. He had been intrusted with divers sums of money from Dawkins as the solicitor of Dawkins, to lay out and invest such money on mortgages on behalf of Dawkins. It was not the specific coins that he had

(1) Law Rep. 2 C. C. R. 123. (2) 41 L. T. (N.S.) 443.

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received which he was to invest, it was not the specific cheques or notes that he was to invest, he had not to keep the specific money or the specific cheques or notes, but what he had to do was to invest the money, not to keep it, but to lay it out. If there had been any direction in writing the prisoner would have been within s. 75, a section which is in two parts, and in which a distinction appears between money to be invested or applied and money intrusted for safe custody. In s. 76 the intrusting for safe custody is dealt with, that section does not deal in any sense with money to be laid out or invested. This would be my opinion if the matter were devoid of authority. That, however, is not the case; *Reg.* v. *Cooper* (1) is an authority for this view. The facts were that Whittaker had obtained a loan of 50*l.* from another person on a deposit of some title deeds, and employed the defendant to raise a further loan. Accordingly the defendant obtained 140*l.* from a Miss Taylor, which he ought to have employed in paying off the previous loan, and handing the balance to Whittaker. He did not pay off the previous loan, and he only paid 60*l.* to Whittaker, keeping him in ignorance that so much as 140*l.* had been obtained, and paying interest on the 140*l.* without Whittaker's knowledge—in fact, misappropriating a portion of the 140*l.* Under these circumstances the defendant was indicted under s. 76, but this Court held that s. 76 was out of the question, because there had been clearly no improper dealing with any money intrusted for safe custody. But if the view now urged by counsel for the prosecution were correct, the money ought to have been held to have been intrusted for safe custody. The Court held that money intrusted for investment was clearly not intrusted for safe custody, and the case bears strongly in favour of the prisoner in this case.

In *Reg.* v. *Fullagar* (2) the Court came to a conclusion which does not appear to conflict with *Reg.* v. *Cooper*. (1) Money was received by an attorney, and he was requested by the owner of the money to keep it until a letter should be received from one Goldsmith, pending which to hold it safely. It was held that the facts brought the defendant within s. 76, and it may well be that the actual intention was that the coin, or the symbols of coin, were to be intrusted for safe custody. The judgment of the Court

(1) Law Rep. 2 C. C. R. 123. (2) 41 L. T. (N.S.) 448.

proceeded on that footing, and if it were not so the decision would be in conflict with the case of *Reg.* v. *Cooper*. (1)

The facts stated before us do not supply the materials which must necessarily be supplied in order to bring this case within s. 76, and, inasmuch as we can only deal with the facts stated, I am of opinion that this conviction ought to be quashed.

DENMAN, J. I feel very great difficulty in saying that the direction of the learned judge was wrong in point of law. If there had been evidence that a specific sum of money was intrusted to the prisoner with specific directions to keep it safely till a certain day, and then to invest it, I think the case would be within s. 76, and, indeed, as I read *Reg.* v. *Fullagar* (2) that case is an authority in support of this view. But the difficulty here is that there was no evidence of anything of this sort; the money may have been in cheques, or other like form, and it may have been intrusted with instructions to get a mortgage as soon as possible in each case. Money so intrusted would be intrusted for a specific purpose, and would fall within s. 75 if there was a direction as to it in writing which was violated contrary to good faith, it would not fall within s. 76. In *Reg.* v. *Cooper* (1) an attorney was employed to raise a loan on mortgage and hand over the balance, after making certain deductions, to the mortgagor. It was held there that no property had been intrusted for safe custody within s. 76. This may mean that the attorney had no permission to hold the money, even for an instant, but it appears to me at present not an unreasonable thing to hold, and that it might in some future case possibly be held, that if specific money be intrusted for investment, it may be treated as intrusted for safe custody for a reasonable time until opportunity for investment should arise. But in the case now before us there is no evidence to support any such view, and I therefore agree that the conviction should be quashed.

STEPHEN, J. I find no fault whatever with the direction of the learned judge as it stands. It is, I believe, in accordance with the cases which have been decided, but, taken together with the facts stated in the case itself, I think it is erroneous. I think the judge should have said that there was no evidence upon which the jury

(1) Law Rep. 2 C. C. R. 123. (2) 41 L. T. (N.S.) 448.

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could say that the money was ever intrusted for safe custody within s. 76. If money is intrusted to an agent on the terms that he is to keep it by him and then to lay it out on mortgage, I should say that is an intrusting for safe custody within s. 76; for this *Reg.* v. *Fullagar* (1) appears to me a direct authority. In the present case we are not informed whether money in any specific form was intrusted, nor whether there were any specific directions as to the keeping of it, or whether it was simply paid by cheque with possibly a current debtor and creditor account, if the latter were the true state of things, there could clearly be no offence within s. 76. Again, there is no evidence of what was to be done with the money in the interval between the intrusting and the investing; therefore it is impossible to conclude that it was intrusted for safe custody during that interval. On this ground alone I think the direction wrong. This view appears to me to be independent of the authority of *Reg.* v. *Cooper.* (2) I do not wish it to be understood that anything I have said implies any disagreement with that case, but I cannot help thinking that there may have been other facts upon which the judgment proceeded. The attention of the Court was apparently directed chiefly to s. 75, whilst s. 76 is very briefly referred to. It is, of course, undesirable to express any opinion as to what may have been the reasons why they considered s. 76 to be out of the question, but it is to be observed that the money was in that case not intrusted by the person defrauded, but by the mortgagee, and it is by no means clear that that fact alone would not have prevented the application of s. 76.

MATHEW and CAVE, JJ., concurred.

Conviction quashed.

Solicitor for prosecution: *G. Feltham, Portsea.*

Solicitors for prisoner: *Emanuel & Co., Agents for Bell & Tayler, Southampton.*

(1) 41 L. T. (N.S.) 448. (2) Law Rep. 2 C. C. R. 123.

C. D.

END OF VOL. VIII.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January, 1882, will be as follows:—

In the First Series,
19 Ch. D.

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8 Q. B. D. 7 P. D.

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COMPANY —*continued.*

should be allotted to the defendant, that he should be appointed a director, and that the resignation of the retiring director should be accepted. The defendant afterwards attended a meeting of the directors, confirmed the allotment to himself, and joined in passing a resolution, that the shares allotted to himself should be paid up in full forthwith. The defendant subsequently withdrew his application and refused to pay the amount of the shares allotted to him. By the articles of association the number of the directors was to be not less than three, and any casual vacancy occurring in the board might be filled up by the board, and the continuing board might act notwithstanding any vacancy in their body:—*Held*, that the defendant was liable to pay the amount of the shares. THE YORK TRAMWAYS COMPANY, LIMITED *v.* WILLOWS - - - - C. A. 685

2. —— *Compulsory Winding-up—Goods delivered after Commencement of Winding-up in pursuance of Contract entered into before—Set-off —Companies Act*, 1862 (25 & 26 *Vict. c.* 89).] In an action by a limited company in the course of compulsory winding-up by the Court for the price of goods supplied to the defendants by the company after, but in pursuance of a contract entered into before, the commencement of the winding-up, i.e., the presentation of the petition for winding-up, such contract not being a sale of specific goods:—*Held*, that the defendants could not set off a debt from the plaintiffs to themselves incurred prior to the commencement of the winding-up. THE INCE HALL ROLLING MILLS COMPANY, LIMITED *v.* THE DOUGLAS FORGE COMPANY - - - 179

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COUNTY COURT—*Action transferred from Divisional Court—Power to stay Proceedings*—30 & 31 *Vict. c.* 142, *s.* 10.] Where an action, commenced in the Divisional Court, has been transferred to a county court under 30 & 31 Vict. c. 142, s. 10, the county court judge has power to make an order staying the proceedings until the plaintiff has

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paid the costs of a previous action brought by him in the Divisional Court against the same defendant. THE QUEEN *v.* BAYLEY - 411

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CRIMINAL LAW—*The Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 13 (3)—*Creditors, removing Property with intent to defraud—Execution, removing Property to defeat—Evidence—Indictment —Execution Creditor.*] A., B., and C. were convicted, under s. 13. sub-s. 3, of 32 & 33 Vict. c. 62, of having, with intent to defraud the creditors of A., removed the property of A. since the date of an unsatisfied judgment against A.—The evidence was, that on the next night after a judgment, which was still unsatisfied, had been obtained against A., the property of A. was removed from his house by A., B., and C., in order to defeat the creditor who had obtained the judgment, and to prevent him from levying thereon to satisfy the judgment. There was no evidence that A. had any other creditors, or that there was any intention to defeat the claims of any creditors of A. other than this particular creditor.—No petition in bankruptcy had been presented against A., nor had any proceedings been taken to have his affairs liquidated by arrangement:—*Held*, by Lord Coleridge, C.J., Denman, Stephen, Mathew, and Cave, JJ., that the absence of proceedings in bankruptcy or for liquidation was not material; that the provisions in question of the above statute applied to all persons; but that the conviction must nevertheless be quashed, inasmuch as an intent to defraud creditors was charged but was not proved. THE QUEEN *v.* ROWLANDS [C. C. R. 530

2. —— *Larceny—Misappropriation of Property intrusted for safe Custody—Larceny Act* (24 & 25 *Vict.* 96), *ss.* 75, 76.] N., a solicitor, was intrusted by a client with money to invest on mortgage on the client's behalf, he, instead of so doing, fraudulently appropriated the money to his own use:—*Held*, by Lord Coleridge, C.J., Denman, Stephen, Mathew, and Cave, JJ., that N. was not intrusted with such money for "safe

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3. —— *Manslaughter — Neglect of Parent to provide medical Aid for Child—Evidence*—31 & 32 *Vict. c.* 122, *s.* 37.] M. was convicted of the manslaughter of his son, a child of tender years. The child died of confluent small-pox, and the prisoner, though able to do so, did not, owing to certain religious views he held, employ any medical practitioner, nor afford to the child during its illness any medical aid or attendance. It was proved that proper medical aid and attendance might have saved or prolonged the child's life, and would have increased its chance of recovery, but that it might have been of no avail; and there was no positive evidence that the death was caused or accelerated by the neglect to provide medical aid or attendance:—*Held*, by Lord Coleridge, C.J., Grove, Stephen, Mathew, and Cave, JJ., that under the above circumstances the conviction could not be sustained. THE QUEEN *v.* MORBY - - - - - C. C. R. 571

4. —— *Inflicting Grievous Bodily Harm — Malice*—24 & 25 *Vict. c.* 100, *s.* 20.] Shortly before the conclusion of a performance at a theatre, M., with the intention and with the result of causing terror in the minds of persons leaving the theatre, put out the gaslights on a staircase which a large number of such persons had to descend in order to leave the theatre, and he also, with the intention and with the result of obstructing the exit, placed an iron bar across a doorway through which they had in leaving to pass.—Upon the lights being thus extinguished a panic seized a large portion of the audience, and they rushed in fright down the staircase forcing those in front against the iron bar. By reason of the pressure and struggling of the crowd thus created on the staircase, several of the audience were thrown down or otherwise severely injured, and amongst them A. and B.—On proof of these facts the jury convicted M. of unlawfully and maliciously inflicting grievous bodily harm upon A. and B.:—*Held*, by the Court (Lord Coleridge, C.J., Field, Hawkins, Stephen, and Cave, JJ.), that M. was rightly convicted. THE QUEEN *v.* MARTIN
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5. —— *Larceny—Money demanded with Menaces.*] The prosecutrix gave L., a travelling grinder, six knives to grind for her, the ordinary charge for grinding which would be 1*s.* 3*d.* L. ground the knives, and then demanded with threats 5*s.* 6*d.* as his charge from the prosecutrix. The prosecutrix, being thus frightened, in consequence of her fears paid L. the sum demanded:—The jury found that the money was obtained by menaces, and convicted L. of larceny:—*Held by the Court* (Lord Coleridge, C.J., Lindley, Hawkins, Lopes, and Bowen, JJ.), that the conviction was right.—*Reg.* v. *M'Grath* (L. R. 1 C. C. R. 205) followed. THE QUEEN *v.* LOVELL - C. C. R. 185

6. —— *Malicious Injuries to Property Act* (24 & 25 *Vict. c.* 97, *s.* 52)—"*Real or Personal Property*" — *Incorporeal Hereditament — Herbage Right.*] The soil of a town moor was vested in the corporation of the town in fee, but freemen and widows of deceased freemen of the town were

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under statute entitled to the "full right and benefit to the herbage" of the town moor for two milch cows:—*Held*, that this right to the herbage was not "any real or personal property whatsoever" within the meaning of the Malicious Injuries to Property Act (24 & 25 Vict. c. 97), s. 52, which applies only to tangible property and not to a mere incorporeal right. LAWS *v.* ELTRINGHAM
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7. —— *Prize-fight — Aiding and Abetting — Assault—Misdemeanour.*] Two men fought with each other in a ring, formed by ropes supported by posts, in the presence of a large crowd. Amongst that crowd were the prisoners. It did not appear that the prisoners took any active part in the management of the fight, or that they said or did anything. They were tried and convicted of assault, as being principals in the second degree. —The jury were directed that prize-fights are illegal, and that all persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so, are guilty in law of an assault, and that if the persons charged were not casually passing by, but stayed at the place, they encouraged the fight by their presence, although thay did not do or say anything. Upon this direction the jury found the prisoners guilty: but added, that they did so in consequence of such direction of law, as they found that the prisoners did not aid or abet:—*Held*, by Denman, J., Huddleston, B., Manisty, Hawkins, Lopes, Stephen, Cave, and North, JJ. (Lord Coleridge, C.J., Pollock, B., and Mathew, J., dissenting), that the above direction was not correct, that mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of an assault as aiding and abetting in such fight, and that the conviction could not be sustained:—*Held*, by Lord Coleridge, C.J., Pollock, B., and Mathew, J., that the conviction could be sustained, that the legal inference to be drawn from mere presence, as a voluntary spectator, at a prize-fight is, in the absence of other evidence to rebut such inference, that the person so present is encouraging, aiding, and abetting such fight, and consequently guilty of assault:—*Held*, by the whole Court, that a prize-fight is illegal, and that all persons aiding and abetting therein are guilty of assault, and that the consent of the persons actually engaged in fighting to the interchange of blows does not afford any answer to the criminal charge of assault:—*Semble*, that mere presence of a person, unexplained, at a prize-fight affords some evidence for the consideration of a jury of an aiding or abetting in such fight. THE QUEEN *v.* CONEY - - 534

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by the plaintiff for resale:—*Held*, by Grove, J., that the plaintiff was not entitled to recover damages for loss of profit on the resale. *Borries* v. *Hutchinson* (8. C B. (N.S.) 445) distinguished. Thol *v.* Henderson - - - - 457

2. —— *Breach of Contract—Cost of Performance not the Measure of.*] The grantees of certain land had covenanted with the grantor, since deceased, that the land, except as to the entrance to be made by them towards an intended new road, should be and be kept enclosed on all the sides abutting on the land of the grantor with a brick wall seven feet high. The grantees not having erected a wall in pursuance of the covenant, an action was brought against them by the executors and devisees of the grantor for damages for the breach of covenant. It appeared that, in the events that had happened, the value of the adjoining land of the plaintiffs was not decreased by the non-erection of the wall to anything like the amount which it would have cost to build the wall:—*Held*, that, the true measure of damages being the pecuniary amount of the difference between the position of the plaintiffs upon the breach of contract and what it would have been if the contract had been performed, under the circumstances of the case the amount that it would cost to build the wall was not the correct measure of the damages. Wigsell *v.* School for the Indigent Blind - - 357

DEFAMATION — *Justification — Evidence of Plaintiff's general bad Character—Rumours of Plaintiff having committed Offences charged in Libel—Mitigation of Damages—Facts not stated in Pleadings—Order XIX., r.* 4.] Action for a libel alleging that the plaintiff, a theatrical critic, had endeavoured to extort money by threatening to publish defamatory matter concerning a deceased actress. Defence—that the allegation was true in substance and fact:—*Held*, by Mathew, and Cave, JJ., that evidence of rumours before the publication of the libel that the plaintiff had committed the offences charged in it, and evidence of particular facts and circumstances tending to shew the misconduct of the plaintiff as a theatrical critic could not be admitted in reduction of damages.—*Held*, further, that assuming such evidence to be material it was rightly rejected, for the particular facts and circumstances were not stated or referred to in the pleadings as required by Order XIX., r. 4. Scott *v.* Sampson - 491

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DOWER—*Release of, by Widow to Mortgagee—Reconveyance.*] The owner in fee of certain lands died intestate, leaving a widow entitled to dower thereout. The heir-at-law executed a mortgage of the lands to secure a sum of money advanced to him by a building society. The widow was a party to the mortgage deed, by which, "for the purpose of extinguishing her right to dower," she granted and released the lands to the mortgagees, the trustees of the building society. It was provided by the deed that, upon repayment of the moneys secured thereby, a receipt should be endorsed thereon in the form given by 6 & 7 Wm. 4, c. 32, to the intent that the deed should be vacated and the property comprised therein be revested in the person or persons for the time being interested in the equity of redemption therein. The moneys secured by the deed having been repaid, and the statutory receipt indorsed thereon:—*Held*, that the widow was, notwithstanding the release of her dower contained in the mortgage deed, entitled to have dower assigned to her out of the premises comprised in the deed. *Dawson* v. *Bank of Whitehaven* (6 Ch. D. 218) distinguished. Meek *v.* Chamberlain - 31

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ELEMENTARY EDUCATION — *Justices—Jurisdiction in Cases under the Elementary Education Acts—Union extending into several Counties—Attendance Order Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79), *ss.* 12, 34; *Poor Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 106), *s.* 27.] The effect of s. 34 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79)—which incorporates for certain purposes all enactments relating to guardians and their officers—is to enable proceedings, before justices for non-compliance with attendance orders and for breach of by-laws under the Elementary Education Acts, in cases where the parents proceeded against reside in a union extending into different counties, to be taken before the justices of either county. The Queen *v.* Eaton - - - - - - 158

EVIDENCE—Libel—Plaintiff's general bad character - - - - 491
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FELONY—Sale of goods in market overt - 109
See Sale of Goods.

FISHING—Right of—Tidal navigable river 626
See Justice. 3.

FRAUD—Concealment—Statute of Limitations
See Limitations. [296

GAMING—"*Place*"—*Station of Betting Man at a moveable Box within Ring at Races*—16 & 17 *Vict. c.* 119, *s.* 3.] By 16 & 17 Vict. c. 119, s. 3, "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes" of betting with persons resorting thereto is liable to a penalty. The respondent and a companion, having paid for admission, were in a railed inclosure of the grand stand at a race meeting. The companion stood on a small wooden box not attached to the ground, and he and the

GAMING—*continued.*
respondent called out offering to make and making bets with other persons. The companion received the money for bets made, and the respondent booked the same. They stood together in one place within the inclosure during the races:—*Held*, that the fixed and ascertained spot defined in the inclosure by the box at which the respondent orally advertised his willingness to bet was a "place" used by him for the purpose of betting with persons resorting thereto, and he was liable to a penalty under 16 & 17 Vict. c. 119, s. 3. GALLAWAY *v.* MARIES - - - - 275

GENERAL AVERAGE—Water poured on cargo
See SHIP. [653

GIFT — *Fiduciary Relation — Physician and Patient—Independent Advice.*] Although a gift made to a person standing in a confidential relation to the donor, as by a patient to a physician, may be voidable, yet, if after the confidential relation has ceased to exist, the donor intentionally elects to abide by the gift, and does in fact abide by it, it cannot be impeached after his death, even if it is not proved that the donor was aware that the gift was voidable at his election. The plaintiffs were executors of G., to whom the defendant had acted as medical adviser. G. made a gift of 800*l.* to the defendant. At the time of the gift no independent advice was given to G., and the relation of physician and patient then existed; but the defendant had not been guilty of any undue influence, and after the relation of physician and patient had ceased, G. elected to abide by the gift, and did in fact abide by it during the rest of her life. It was not proved that G. was aware that the gift was voidable:—*Held*, that the gift made by G. to the defendant could not be impeached after her death. *Rhodes* v. *Bate* (Law Rep. 1 Ch. 252) commented on. MITCHELL *v.* HOMFRAY - - - - C. A. 587

HERBAGE — Malicious injury—"Real or personal property" - - - 283
See CRIMINAL LAW. 7.

HIGHWAY—*Highways and Locomotives Amendment Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Excessive Weight—Extraordinary Traffic—Traffic caused in building a House.*] Materials for building a house were carried by the respondent over a highway, and he was summoned under s. 23 of the Highways and Locomotives Amendment Act, 1878, by the appellants to recover the amount of expenses incurred by them by reason of the damage to the highway. The justices dismissed the summons, subject to a special case in which they found that the traffic conducted by the respondent was in aggregate weight and in quantity excessive and extraordinary as compared with the ordinary traffic along the highway, which was light agricultural traffic, that the highway had been damaged thereby, that the amount expended on the highway by reason thereof was in excess of the average expense of repairing highways in the neighbourhood, and was an extraordinary expense incurred by reason of such damage, but that the traffic did not materially differ in character from that to be expected on the highway:—*Held* (by Grove and Lopes, JJ.), that the respondent was not liable

HIGHWAY—*continued.*
for the damage to the highway. THE PICKERING LYTHE EAST HIGHWAY BOARD *v.* BARRY - 59

2. —— *Highways and Locomotives Amendment Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Extraordinary Traffic—Excessive Weight—Branch Road — Conveyance of Manure to Farm — Traction Engines.*] Justices having made an order charging the expenses of repairing a highway upon the appellants as being extraordinary expenses within 41 & 42 Vict. c. 77, s. 23, it appeared that the highway communicated at either end with main roads, and was principally used by farmers and occupiers of land adjoining it for ordinary farm traffic. The appellants having been employed to convey a quantity of manure to a farm adjoining the road, carried it there by means of a traction engine and trucks, the engine weighing eight and the truck five tons. The road, which had not been prepared for, and was not adapted to, the weight of traction engines, was, in consequence of such traffic, rendered unfit for use. The carriage of farm materials and produce by traction engines was usual in the neighbourhood, though not upon this particular road:—*Held*, that the order was right, the passage of traction engines and trucks being "extraordinary traffic" upon the particular road. THE QUEEN *v.* ELLIS - - 466

3. —— *Repair — Disturnpiked Roads—Main Roads—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.] The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), by s. 13, enacts that any road which has "between the 31st of December, 1870, and the date of this Act ceased to be a turnpike road" . . . "shall be deemed to be a main road, and one half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road, shall, as to every part thereof which is within the limits of any highway area be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate."—The corporation of the town and borough of R., was the highway authority of the R. highway area. Under ss. 47–50 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), such portions of the turnpike roads entering R. as came within the area of the town "were taken out of the turnpike trusts, and the obligation to repair the same was imposed upon the corporation. By a local Act in 1872, the boundaries of the borough were enlarged and all the provisions of the Acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that the further portions of the turnpike roads, thus for the first time brought within the area of the borough, were taken out of the turnpike trusts by the operation of the Towns Improvement Clauses Act, 1847, and ceased to be turnpike roads:—*Held*, reversing the decision of the Queen's Bench Division, that these portions which had so ceased to be turnpike roads, were main roads within s. 13 of the Highways and Locomotives (Amendment) Act, 1878, and that consequently the county authority were liable to pay half the expenses of their maintenance. THE MAYOR OF ROCHDALE *v.* THE JUSTICES OF LANCASTER - - C. A. 12

HOUSE—Let in different tenements—Duty 421
See REVENUE.

HUSBAND AND WIFE—*The Married Woman's Property Act* (1870) *Amendment Act*, 1874 (37 & 38 *Vict. c.* 50), *s.* 5—"*Subsequent Action*"—*Construction of.*] The Married Woman's Property Act, 1874, s. 5, enacts that when a husband after marriage has a judgment bonâ fide recovered against him in any action brought under the Act to recover a debt of the wife contracted before marriage, "then to the extent of such judgment the husband shall not in any subsequent action be liable":—*Held*, that the words "any subsequent action" mean any action commenced subsequently to the time of bringing the action in which judgment has been recovered, and not merely any action commenced subsequently to the recovery of the judgment. FEAR *v.* CASTLE 380

—— Judgment against married woman - 177
See PRACTICE. 11.

INCLOSURE—*Extinguishment of Right of Common—Allotment—Lease of Land, to which Right of Common was formerly attached*—8 & 9 *Vict. c.* 118.] When upon the inclosure of waste lands under 8 & 9 Vict. c. 118, rights of common over them have been extinguished, the allotments awarded in lieu of rights of common are not to be deemed parts of the lands to which the rights of common were annexed, but are to be deemed to have been granted to the owner of those lands; and a lease of land, to which rights of common were formerly attached, will not, after they have been extinguished by an inclosure of the waste lands, pass by general words the right to the possession of the allotment.—Rights of common over H. were attached to a farm. In 1857 a provisional order was made for inclosing H., and the rights of common over it were extinguished as from May, 1859. Allotments were made to the owner of the farm in lieu of the rights of common. In 1866 a lease for sixty years of the farm was granted at a fixed rent: the lease contained the usual general words:—*Held*, that the right to the possession of the allotments did not pass with the lease. WILLIAMS *v.* PHILLIPS - - C. A. 437

INCOME TAX — Trade exercised in United Kingdom - - - - 414
See REVENUE. 2.

INSURANCE (FIRE)—*Vendor and Purchaser—Insurance by Vendor—Fire after Contract but before Completion—Right to Insurance Moneys—Subrogation.*] A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor with the plaintiffs, an insurance company, against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance money from the plaintiffs:—*Held*, by Chitty, J., in an action by the plaintiffs against the vendor, that the plaintiffs were not entitled to recover back the insurance money from the vendor, either for their own benefit or as trustees for the purchaser.—On payment of the moneys secured by a policy of fire insurance, the insurers are entitled to enforce all the remedies, whether in contract or

INSURANCE (FIRE)—*continued.*
in tort, which the insured has against third parties whereby the insured can compel such third parties to make good the loss insured against; but where such right of subrogation is claimed under a contract between the insured and third parties, the contract must be one relating solely to the subject-matter of the insurance, and must be moreover one which subsists at the time when the claim under the policy has matured. CASTELLAIN *v.* PRESTON - 613

INSURANCE (MARINE)—*Policy, Action on—Discovery of Ship's Papers—Form of Order—Whether rightly made on all Persons interested—Continuance of Practice in Force before Judicature Acts—Rules of Supreme Court, Order XXXI., r.* 11, *and Order LX A, r.* 12.] In an action on a policy of marine insurance, underwriters are entitled to discovery of ship's papers, in accordance with the practice in force before the Judicature Acts, without an affidavit, and from all persons interested in the proceedings. THE CHINA TRANSPACIFIC STEAMSHIP COMPANY *v.* THE COMMERCIAL UNION ASSURANCE COMPANY - - C. A. 142

2. —— *Policy—Construction—Perils insured against—Barratry—Warranty "free from Capture and Seizure"—Whether Barratry causing Capture within Warranty.*] In a time policy of marine insurance the ordinary perils insured against (including "barratry of the master") were enumerated, and the subject-matter of insurance was warranted "free from capture and seizure.' During the continuance of the policy, in consequence of the barratrous act of the master, the ship was seized and detained for smuggling. In an action on the policy to recover expenses incurred by the owner in obtaining her release:—*Held*, that the loss must be imputed to the excepted perils, capture and seizure, which directly caused it, and not to the barratry of the master, and therefore that the underwriter was not liable. CORY *v.* BURR - - - 313

INTEREST — Justice — Disqualification — Town Council - - - - 383
See JUSTICE. 2.

INTERPLEADER—Costs—Appeal - - 82
See PRACTICE.

JURISDICTION—Court of Admiralty—Dock 609
See ADMIRALTY.

—— Justices—Right of fishing—Tidal navigable river - - - - - 626
See JUSTICE. 3.

JUSTICE OF PEACE—*Disqualification from Bias—Litigant in similar Cases—Waiver of Objection.*] At a special sessions for appeals against a poor-rate, the chairman of the magistrates, who was himself appellant in one of the cases for hearing, took part in the decision of all the cases except his own. When his own case was called on, he left the bench and went to the body of the court and conducted the case himself. On a rule for a certiorari to bring up all the orders for the purpose of quashing them:—*Held*, by Field and Bowen, JJ., that the chairman, being a litigant in a matter similar to the other matters before the Court, was disqualified from acting as a justice,

JUSTICE OF PEACE—*continued.*

and that the orders were bad.—Before the sessions were held the appellants gave notice to the clerk of the justices that objection would be made "if any justices who were rated in Yarmouth heard the appeals." At the hearing this objection, and no other, was made, and it was overruled by the justices:—*Held*, that the appellants were not precluded by the form of their notice from contending, in support of the rule for a certiorari, that the chairman, even if not disqualified by reason of his being rated, was disqualified by reason of his being himself a litigant; although this latter objection was not specifically mentioned in the notice, or made before the justices. THE QUEEN *v.* JUSTICES OF GREAT YARMOUTH - - 525

2. —— *Interest disqualifying—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 258—*Town Council—Enforcing Borough Rate.*] Where by statute a member of the town council of a borough may act as a justice of the peace in matters arising under the Act, in order to disqualify him from so acting it is not sufficient to shew that, as a member of the town council, he has a pecuniary interest in the result of the information or complaint, or that the corporation of which he is a member are the prosecutors, but it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter.—*Reg.* v. *Gibbon* (6 Q. B. D. 168) disapproved.—An officer of a corporation appointed to collect the borough rate obtained a summons against a ratepayer in arrear. In so doing he acted in the discharge of his duty, but on his own responsibility and without consulting the town council. At the hearing the justices dismissed the summons, on the ground that one of the sitting magistrates being a town councillor was thereby disqualified from adjudicating upon the summons. On motion for a mandamus to the justices to hear and adjudicate on the summons:—*Held* (by Field and Cave, JJ.), that there was no ground for supposing either substantial interest or likelihood of bias, and consequently no disqualification. THE QUEEN *v.* HANDSLEY - 383

3. —— *Jurisdiction of, when ousted—Reasonable claim of Right—Fishing, Public Right of—Tidal navigable River—Tide, what constitutes—Damming back of Water by exceptionally High Tides.*] An information was laid against the appellant for unlawfully fishing in a river wherein the respondents had a private right of fishery. It was proved that the river was navigable, and that at the place where the appellant fished the water was not salt, and that in ordinary tides it was unaffected by any tidal influence, but that upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water and caused it upon those occasions to rise and fall with the flow and ebb of the tide. The appellant contended that, the river being navigable and tidal at the place in question, there was a presumption that the public had a right to fish there, and that the jurisdiction of the justices was therefore ousted by a reasonable claim of right:—*Held*, that the river at the place in question could not be considered as tidal within the meaning of the rule of law which gives the public a right to fish in navigable tidal rivers, and therefore there was no claim of title set up sufficient to oust the justices' jurisdiction. REECE *v.* MILLER [626

4. —— *Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 21, 35—*Sum of Money "claimed to be due"—Railways Clauses Consolidation Act* (8 *Vict. c.* 20), *ss.* 103, 145—*Penalty for Travelling with intent to avoid Payment of Fare — Distress Warrant — Procedure.*] The penalty imposed by s. 103 of the Railways Clauses Consolidation Act (8 Vict. c. 20), for travelling in a railway carriage without having paid the fare and with intent to avoid the payment of it, is not "a sum of money claimed to be due and recoverable on complaint to a court of summary jurisdiction" within the meaning of s. 6 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and is not subject to the procedure for the recovery of civil debts in a court of summary jurisdiction prescribed by s. 35 of the same Act. THE QUEEN *v.* PAGET - - - - C. A. 151

—— Jurisdiction—Union extending into different counties - - - - 158
See ELEMENTARY EDUCATION.

LANDLORD AND TENANT—*Covenant in Lease against Carrying on Offensive Trade—Extra Rent reserved in case of breach of such Covenant—Forfeiture.*] The defendants were assignees of the lease of certain premises, which had been demised by the plaintiffs for a term of years, the reddendum being as follows: "yielding and paying a yearly rent of 30*l.* by equal quarterly payments" on the usual quarter days, "and a like yearly rent of 25*l.* by like equal payments in case any of the trades, occupations, or things hereinafter covenanted not to be carried on or done upon the said premises shall be carried on or done."—The lessees, among other usual covenants, covenanted not to carry on upon the premises certain specified trades or businesses, nor any offensive, noisome, or noisy trade or business whatsoever, nor do, nor suffer to be done, anything which might be or grow to the damage or annoyance of the lessors. The lease contained a condition of re-entry if the said yearly rent of 30*l.* or the said further rent of 25*l.*, in case the same should become payable, were in arrear, or if and whenever there should be a breach of any of the covenants thereinbefore contained on the part of the lessees.—The defendants having carried on upon the demised premises a business within the terms of the above-mentioned covenant, the plaintiffs sued to recover the premises as upon a forfeiture of the lease:—*Held*, that the lease could not be construed as meaning that the defendants were entitled to carry on the business in question upon payment of the additional rent mentioned in the reddendum, and that the plaintiffs were entitled to re-enter under the condition for re-entry. WESTON *v.* THE MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT [387

LARCENY—Misappropriation of property intrusted for safe custody - - 706
See CRIMINAL LAW. 2.

—— Money demanded with menaces - - 185
See CRIMINAL LAW. 6.

LIBEL—Evidence—Plaintiff's bad character—Rumours - - - - 491
See DEFAMATION.

LICENSING ACTS—*Clubs—Intoxicating Liquors—"Sale by Retail"—The Licensing Act,* 1872 (35 & 36 *Vict. c.* 94), *s.* 3.] The appellant was manager of an institution carried on bonâ fide as a club, under rules by which members paid an entrance fee and subscription; trustees were appointed in whom all the club property was vested, and there was a committee of management (for whom the appellant acted) to conduct the general business. The club was not licensed for the sale of intoxicating liquors, but these were supplied, at fixed prices, to members for consumption on and off the premises, 33 per cent. above the cost price being charged for liquors to be consumed off the premises, and the money produced thereby going to the general funds of the club. The appellant having, in the course of his employment as manager, supplied intoxicating liquors to a member (who paid for them) for consumption off the premises:—*Held*, that the appellant did not "sell by retail" intoxicating liquors within the meaning of s. 3 of the Licensing Act, 1872, and therefore was not liable to conviction for an offence under the section. GRAFF *v.* EVANS 373

2. —— *Public-house Sunday Closing (Wales) Act,* 1881 (44 & 45 *Vict. c.* 61), *s.* 3—*Commencement of.*] By s. 3 of the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), passed on the 27th of August, 1881, "This Act shall commence and come into operation with respect to each division or place in Wales on the day next appointed for the holding of the general annual licensing meeting for that division or place":—*Held*, that "the day next appointed" is the day which shall, after the passing of the Act, be next appointed for the holding of the meeting RICHARDS *v.* MCBRIDE - - - 119

3. —— *Licensing Acts,* 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 51—*Fine or Imprisonment—No Order of Distress—Summary Jurisdiction Act,* 1879 (42 & 43 *Vict. c.* 49), *s.* 21, *sub-s.* 3.] The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21, sub-s. 3, does not apply to the Licensing Acts, 1872 (35 & 36 Vict. c. 94), s. 3, sub-s. 1, s. 51, sub-s. 2, so as to give justices jurisdiction to order imprisonment for non-payment of a penalty exceeding 5*l.*, under s. 3, without first ordering a distress.—By the Licensing Act, 1872, s. 2, an unlicensed person selling intoxicating liquors is liable to a penalty or to imprisonment:—*Held*, that a conviction imposing a penalty exceeding 5*l.*, and, in default of payment, imprisonment, was bad. *In re* CLEW - - - 511

4. —— *Sale of Beer off the Premises—Application for Licenses—Value of House*—3 & 4 *Vict. c.* 61, *s.* 1—*The Licensing Act,* 1872 (35 & 36 *Vict. c.* 94), *s.* 45—*Notice to Applicant of grounds of Refusal—Wine and Beerhouse Act,* 1869 (32 & 33 *Vict. c.* 27), *s.* 8.] An application for a license to sell beer by retail not to be consumed on the premises was refused by justices, on the ground that the house was not duly qualified by law, not being of sufficient value under 3 & 4 Vict. c. 61, s. 1. The Wine and Beerhouse Act, 1869, s. 8, requires the justices, where such an application is refused on the ground that the house is not duly qualified as by law required, to specify in writing to the applicant the grounds of their decision. A minute of the decision with the grounds of it was made and read out by the chairman in Court, in the presence of the applicant, but no copy was delivered to him. On a rule for a mandamus to the justices to hear and determine the application:—*Held* (by Field and Cave, JJ.), that the provisions as to rating qualification for houses for the sale of beer and cider for consumption off the premises under 3 & 4 Vict. c. 61, s. 1, had not been affected by the Licensing Act, 1872, s. 45, which must be construed as applying only to premises licensed before the Act, or to be licensed under it, for the sale of intoxicating liquor thereupon.—*Held*, also that, in the absence of any request by the applicant for a writing shewing the reasons for the decision of the justices, the notice was sufficient. THE QUEEN *v.* THE JUSTICES OF CUMBERLAND. - 369

LIMITATIONS, STATUTE OF—*Reply of concealed Fraud and Absence of reasonable Means of Discovery.*] In an action to recover damages for fraudulent representations, a reply to a defence of the Statute of Limitations, that the plaintiffs did not discover and had not reasonable means of discovering the fraud within six years before action, is good. GIBBS *v.* GUILD - - - 296

LOCAL GOVERNMENT ACTS—*Urban Sanitary Authority—Contract not under Seal—Executed Contrac for Construction of Waterworks—Order by Borough Surveyor appointed under Seal—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 173, 174.] The 174th section of the Public Health Act, 1875, which imperatively requires that every contract made by an urban authority, whereof the value or amount exceeds 50*l.*, must be in writing and sealed with the common seal of such authority, applies not only to an executory but also to an executed contract, although made by an agent duly appointed under seal.—The defendants, being an urban sanitary authority, by contract under seal duly employed P. to construct waterworks. One of the terms of such contract was, that if P. should make default the defendants' engineer might employ persons to finish it, and charge P. with the expense. P. made default, and the defendants' engineer, who had been appointed under seal, by contract in writing employed the plaintiffs not only to finish P.'s contract, but to execute certain additional works not specified therein. The plaintiffs executed such works, and the defendants had the benefit of them. The defendants, acting throughout as an urban sanitary authority, approved the contract of their engineer with the plaintiffs, but none of the provisions of the 174th section of the Public Health Act, 1875, were complied with in relation to such contract:—*Held*, affirming the judgment of the Queen's Bench Division (Mathew and Williams, JJ.), that such contract was not binding on the defendants. YOUNG *v.* THE CORPORATION OF LEAMINGTON - - - - C. A. 579

2. —— (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Notice to several Owners to Sewer, Pave, &c.—Default by One only—Right to execute Works without giving fresh Notice—Apportionment, when conclusive—Summary Proceedings—Delay between*

LOCAL GOVERNMENT ACTS—*continued.*

Complaint and Summons.] The appellant and five others were the owners of premises within the district of the respondents, an urban authority under the Public Health Act, 1875. These premises abutted upon a street (not being a highway), which street was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the respondents. The respondents gave a separate notice to each of such owners requiring them to sewer, level, pave, flag, and channel the parts of the street in front of their premises, within a specified time. Five of the owners executed the works in front of their premises, but the appellant made default. The respondents thereupon executed the works required to de done in front of her premises, and their surveyor having made his apportionment, gave her a notice stating that the expenses had been apportioned by their surveyor, who had settled that 213*l.* 13*s.* 6*d.* was payable by her according to the frontage of her premises, and that they required payment of that sum:—*Held*, first, that the respondents were not bound before executing such works to give the appellant a fresh notice specifying the particular works which remained to be done by her; secondly, that the respondent not having given notice to dispute the apportionment, it became binding on her within the three months limited by s. 257, and that summary proceedings might be taken under that section for the recovery of the amount due from her; thirdly, that in such summary proceedings it was no objection to the validity of a summons that it was issued more than a year after the complaint upon which it was founded; fourthly, that the notice of apportionment, which concluded with a demand of payment of the amount apportioned, was not a "notice of demand" within s. 257, and that the six months within which, under s. 252, summary proceedings must be taken, were not to be reckoned from it but from a subsequent notice of demand. SIMCOX *v.* THE LOCAL BOARD FOR HANDSWORTH, STAFFORD - - - 39

3. —— *Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *s.* 47—*Nuisance by keeping Swine—Absence of Injury to Health.*] It is an offence under the Public Health Act, 1875, s. 47, to keep swine so as to be a "nuisance" in the common law meaning of the term. It is not necessary to such offence that there should be any injury to health. THE BANBURY URBAN SANITARY AUTHORITY *v.* PAGE - - - - - - - 97

4. —— *Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *ss.* 156, 252—*Continuing Offence—Information—Time.*] By s. 156 of the Public Health Act, 1875, it is an offence to bring forward or build any addition to a house in a street beyond the front of the house or building on either side without the consent of the urban authority; and "any person offending against this enactment shall be liable to a penalty not exceeding 40*s.* for every day during which the offence is continued after written notice in this behalf from the urban authority:"—*Held*, that an offence to which the penalty was applicable continued so long as the addition to the house was maintained after written notice from the urban authority, notwithstanding that the addition was completed before the notice was given. *Marshall* v. *Smith* (Law Rep. 8 C. P. 416) distinguished. RUMBALL *v.* SCHMIDT 603

5. —— *Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *s.* 211—*Owner rated instead of Occupier—Rate in respect of Tenements whether Occupied or Unoccupied—Reduced Estimate—Proportion of Annual Value.*] The Public Health Act, 1875, (38 & 39 Vict. c. 55), s. 211—which enables the owner to be rated to general district rates instead of the occupier, with a proviso that in cases where the owner is rated instead of the occupier he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of the net annual value; and when such reduced estimate is in respect of tenements, whether occupied or unoccupied, then such assessment to be made on one half of the amount at which such tenement would be liable to be rated if they were occupied and the rate levied on the occupiers—gives a compulsory power to the local authority to rate the owner in respect of premises whether occupied or unoccupied, but subject to the obligation of making the assessment upon one-half of the rateable value. THE QUEEN *v.* BARCLAY - - - - - - 306

6. —— *Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *s.* 211—*Owner rated instead of Occupier—Rate in respect of Tenements whether occupied or unoccupied—Reduced Estimate—Proportion of annual Value.*] By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, the owner instead of the occupier may, at the option of the urban authority, be rated to general district rates, provided that in cases where the owner is rated instead of the occupier he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of the net annual value; and where such reduced estimate is in respect of tenements whether occupied or unoccupied, then such assessment may be made on one half of the amount at which such tenements would be liable to be rated if the same were occupied, and the rate were levied on the occupiers:—*Held*, affirming the decision of the Queen Bench Division, that a discretionary power is given to the urban authority by that enactment to rate the owner in respect of premises whether occupied or unoccupied, but where the owner is so rated the assessment must only be upon one half of the rateable value. THE QUEEN *v.* BARCLAY - - - C. A. 486

7. —— *Sewer of Local Authority—Obligation of Landowner to preserve subjacent support for—Compensation for Deprivation of Power to work Mines—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *ss.* 15, 16, 175, 308.] The Public Health Act, 1875, imposes on landowners, through whose land a sewer is run under that Act, an obligation to preserve to such sewer subjacent support, and gives them a right to immediate compensation for being deprived of free power to work subjacent mines, but not for the risk of percolation of sewage into the subjacent mines. *In re* CORPORATION OF DUDLEY - - - - C. A. 86

LODGER—Borough franchise—Part of house 195
See PARLIAMENT.

LODGER—*continued.*

—— Borough franchise—Declaration - 247
See PARLIAMENT. 2.

MALICIOUS PROSECUTION — *Reasonable and Probable Cause — Onus of Proof — Direction to Jury.*] At the hearing of a plaint in a county court to recover rent the tenant's son was called as a witness, and swore that he had given up the key of the premises to the landlord before the rent accrued due. The landlord denied this, and subsequently prosecuted the witness for perjury. He was acquitted, and brought an action against the landlord for malicious prosecution. At the trial the plaintiff and defendant repeated their evidence as to the key, and the judge directed the jury alternatively that if they could not arrive at a conclusion as to which of the parties was speaking the truth, the plaintiff had not made out his case, and the defendant was entitled to a verdict; and that if they thought the plaintiff did give up the key, but the defendant owing to a defective memory had forgotten the occurrence and went on with the prosecution honestly believing that the plaintiff had sworn falsely and corruptly, then the jury would not be justified in saying that the defendant maliciously and without reasonable and probable cause prosecuted the plaintiff, and the defendant would be entitled to their verdict:—*Held*, that the direction was right. HICKS *v.* FAULKNER - - - - 167

MANSLAUGHTER—Neglect of parent to provide medical aid - - - - 571
See CRIMINAL LAW. 3.

MARRIED WOMAN—Judgment against husband for debt of wife before marriage - 380
See HUSBAND AND WIFE.

MASTER AND SERVANT—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *ss.* 4, 7—*Notice of Injury—Written Notice necessary.*] By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 4, an action for the recovery under this Act of compensation for an injury shall not be maintainable, unless "notice that injury has been sustained" is given within six weeks. By s. 7 notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date, and shall be served on the employer, and may be served by delivery or by post:—*Held*, that notice under the Act must be in writing. MOYLE *v.* JENKINS - - 116

2. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42, *ss.* 4, 7—*Notice of Injury—Written Notice necessary — Sufficiency of Notice.*] The notice of injury sustained by a workman which is to be given to an employer under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), must contain in writing all the particulars required by s. 7, in order to fulfil the condition precedent to bringing an action enacted by s. 4.—*Query*, if such notice can be made by one writing referring to another writing.—Where a workman, on the day he had been injured, made a verbal report of such injury to his employer's inspector who took down the details in writing and sent them to the employer's superintendent, and afterwards the workman's solicitor wrote a letter to the employer, stating that he was instructed by

MASTER AND SERVANT—*continued.*

such workman to apply for compensation for injuries received on the employer's premises, "particulars of which have already been communicated to your superintendent":—*Held*, that such letter did not refer to any other writing, and was not a notice in compliance with the Act. KEEN *v.* THE MILLWALL DOCK COMPANY **C. A. 482**

MEETING OF RATEPAYERS — *Poll — Public Libraries Act* 1855 (18 & 19 *Vict. c.* 70), *s.* 6—*Public Libraries Amendment Act* (*England and Scotland*), 1866 (29 & 30 *Vict. c.* 114), *ss.* 5, 7 — *Public Libraries Amendment Act*, 1877 (40 & 41 *Vict. c.* 54), *s.* 1.]. A meeting of ratepayers was summoned for the purpose of determining whether the provisions of the Public Libraries Acts should be adopted in the defendants' district. A chairman having been chosen, the resolution to adopt the Acts was carried upon a show of hands; a poll was demanded, but the chairman refused to grant it. The defendants declined to put in force the Acts:—*Held*, that the right to demand a poll existed by the Common Law, and had not been taken away by any of the provisions contained in the Public Libraries Acts, and that the defendants could not be compelled by mandamus to carry out the Acts. THE QUEEN *v.* THE WIMBLEDON LOCAL BOARD - **C. A. 459**

METROPOLIS LOCAL MANAGEMENT ACTS—*Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 98—*Formation and Width of Streets—"Open at both ends."*] By the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), s. 98, no road being of less width than forty feet shall hereafter be formed or laid out for building as a street for the purposes of carriage traffic unless such road be widened to the full width of forty feet, or for the purposes of foot traffic only unless such road be widened to the full width of twenty feet, "or" unless such streets respectively shall be open at both ends:—*Held*, that such street must be of the width prescribed and be also open at both ends. METROPOLITAN BOARD OF WORKS *v.* STEED - 445

MUNICIPAL ELECTION — *Corrupt Practices (Municipal Elections) Act*, 1872 (35 & 36 *Vict. c.* 60), *s.* 22—*Expenses of Election Court—Amendment of Order—Court of Record—Certificate of Commissioners of Treasury—Rate—Mandamus.*] Upon the trial of a petition against the return of a borough councillor under the Corrupt Practices (Municipal Elections) Act, 1872, 35 & 36 Vict. c. 60, the barrister in delivering judgment said that he found the councillor guilty of personal bribery, and that all the costs of the inquiry were to be borne by him, and made an order in writing for the payment by the councillor of certain costs under s. 19 of the Act. The written order made no provision for the remuneration and allowances to the barrister and other persons under s. 22. The Lords Commissioners of the Treasury paid the amount of such remuneration and allowances and certified the payment to the borough treasurer, and required him to repay them the amount out of the borough fund or rates as provided by s. 22. A rate was accordingly made and levied. The Commissioners afterwards on receiving from the barrister a letter stating that he had always intended to visit all the costs upon the councillor,

MUNICIPAL ELECTION—*continued.*
and had said so in giving judgment, cancelled their certificate, and the borough corporation abandoned their rate and returned the sums levied to the ratepayers. Several months later the Commissioners, finding that the barrister had made no written order for the payment of the remuneration and allowances under s. 22, issued a fresh certificate requiring the borough treasurer to repay them out of the borough fund or rates, the amount of such remuneration and allowances. These facts being raised upon the return to a mandamus commanding the treasurer to repay the Commissioners out of the borough fund or rate, and the corporation to cause such repayment:—*Held* (by Lord Coleridge, C.J., Pollock, B., and Manisty, J.), that no valid order was made by the barrister for the payment by the councillor of such remuneration and allowances under s. 22:—*Held*, also (by Lord Coleridge, C.J., and Pollock, B.), that the Election Court for the trial of petitions under the Act was by virtue of s. 14, sub-s. 5, a Court of record, and that the Queen's Bench Division could not amend the barrister's order so as to make it include the payment of such remuneration and allowances:—*Held*, also (by Lord Coleridge, C.J., and Pollock, B., diss. Manisty, J.), that the act of the Commissioners in certifying was a ministerial and not a judicial act, and that they had the power and were bound to make the second certificate; and were entitled to a peremptory mandamus compelling the treasurer to repay to them the amount of such remuneration and allowances out of the borough fund or rate, and compelling the corporation to order such amount to be levied by a borough rate:—*Held* (by Manisty, J.), that the Commissioners having issued a certificate and cancelled it, and caused the first rate to be returned to the ratepayers, could not issue another certificate and require a second rate to be levied; also that the Commissioners having failed to apply promptly for repayment were without remedy; also that the mandamus was bad on demurrer for not averring that the prosecutors had applied in proper time, that is in reasonable time; also that in the exercise of its discretion the Court ought to refuse a peremptory mandamus. THE QUEEN *v.* CORPORATION OF MAIDENHEAD - - - - 339

2. —— *Municipal Elections Act*, 1875 (38 & 39 *Vict. c.* 40), *s.* 1 *sub-s.* 2—*Nomination—Subscription of Nomination Papers—Assenting Burgesses.*] Sect. 1, sub-s. 2, of the Municipal Elections Act, 1875, provides that every candidate at a municipal election shall be nominated in writing subscribed by two burgesses as proposer and seconder, and by eight others as assenting to the nomination, and that "each candidate shall be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more."—At a municipal election where there were four vacancies to be filled a burgess subscribed four nomination papers, which were delivered within due time, and subsequently he subscribed a fifth nomination paper, which was also delivered in due time. In each case he subscribed as one of the eight assenting burgesses required by the Act:—*Held*, that the first four nomination papers were valid, and that the fifth was invalid. BURGOYNE *v.* COLLINS - 450

NEGLIGENCE—*Liability of Proprietor of Cab for Negligence of Driver—Horse provided by Driver—Metropolitan Hackney Carriages Acts* (1 & 2 *Wm.* 4, *c.* 22), *ss.* 6, 20, 23—6 & 7 *Vict. c.* 86, *ss.* 10, 21, 24, 28, 35.] The plaintiff's cart and pony were injured by a cab plying in the streets of London, owing to the negligence of the cab-driver. The defendant was proprietor of the cab and licensed to ply it for hire. He had let the cab to the driver for a weekly payment, the horse, harness, and whip being provided by the driver with whom the defendant had nothing to do beyond receiving money from him:—*Held*, that under the circumstances there was nothing in the Metropolitan Hackney Carriage Acts (1 & 2 Wm. 4, c. 22, and 6 & 7 Vict. c. 86), to make the defendant liable for the negligence of the driver.—*Powles* v. *Hider* (6 E. & B. 207), and *Venables* v. *Smith* (2 Q. B. D. 279) considered. KING *v.* SPURR - - - - 104

NEW TRIAL—Verdict against evidence - 176
See PRACTICE. 12.

NOTICE—Employers' Liability Act, 1880 116
See MASTER AND SERVANT.

—— Of objection—Borough franchise—Mistake—Power of amendment - - 259
See PARLIAMENT. 3.

OFFICIAL REFEREE—Compulsory reference—Appeal - - - - 664
See PRACTICE. 13.

PARLIAMENT—*Borough Franchise—Dwelling-house—Part of a House—Occupation as Lodger—* 30 & 31 *Vict. c.* 102, *s.* 61—41 & 42 *Vict. c.* 26, *s.* 5.] Although by the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 5, the term "dwelling-house" in the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), is to mean part of a house separately occupied, yet in order to be entitled to the borough franchise as the occupier of a dwelling-house, the person must have an occupation in respect of which he can be rated to the relief of the poor, and therefore he is not entitled to such dwelling-house franchise by reason of the occupation of part of a house if he occupies such part as a lodger.—The tenant of two rooms which he took unfurnished at a weekly rent, had the exclusive use of such rooms, and a key of the outer door of the house. His landlord had also a key of the outer door, and resided in all the rest of the house, but supplied no attendance or service to such tenant:—*Held*, that such tenant occupied the rooms as a lodger, and consequently that in respect of such occupation he could not acquire the dwelling-house franchise under the Representation of the People Act, 1867.—The tenant of two rooms which he took unfurnished at a weekly rent, had in common with the other tenants of the house, which was wholly let out on similar tenancies, the use of the passages, staircase, street-door, and usual conveniences of the house. The landlord and not the

PARLIAMENT—*continued.*
tenant was rated, and the landlord did all repairs inside and out, but he did not reside in the house, nor did he, save as aforesaid, retain the control and dominion over the house, or render any services to any of the tenants:—*Held*, that such tenant did not occupy the rooms as a lodger, but as an occupying tenant under the Representation of the People Act, 1867, and that he could therefore acquire the dwelling-house franchise in respect of such occupation. BRADLEY *v.* BAYLIS; MORFEE *v.* NOVIS; KIRBY *v.* BIFFEN - 195

2. —— *Borough Vote—Lodger Franchise—Declaration—Primâ Facie Evidence—Representation of the People Act*, 1867 (30 & 31 *Vict.* c. 102), *s.* 4—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 23.] Sect. 23 of the Parliamentary and Municipal Registration Act, 1878, which enacts that in the case of a person claiming to vote as a lodger the declaration annexed to his notice of claim shall, for the purposes of revision, be primâ facie evidence of his qualification, is general, and applies to lodgers claiming for the first time under s. 4 of the Representation of the People Act, 1867, as well as to claims under s. 22 of the Parliamentary and Municipal Registration Act, 1878, by lodgers retaining the same lodgings in successive years. NUTH *v.* TAMPLIN - - - C. A. 247

3. —— *Borough Vote—Notice of Objection—Omission of Place of Abode of Objector—Mistake—Power of Amendment*—41 & 42 *Vict. c.* 26, *s.* 28, *sub-s.* 2.] An objector described himself in the notice of objection as "on the list of parliamentary voters for the parish of H.," but omitted to insert his place of abode. He was a solicitor practising at H., was a clerk to the magistrates and coroner, and had resided at H. all his life. It was admitted that the insertion of the words "of H." would have sufficiently described the objector's place of abode, and the revising barrister found as a fact that no one had been misled or deceived by the omission:—*Held*, that under the circumstances the omission was a "mistake" within the meaning of 41 & 42 Vict. c. 26, s. 28, sub-s. 2, which the revising barrister had power to amend. ADAMS *v.* BOSTOCK - - 259

4. —— *Perjury—Evidence—Indictment—Information—Corrupt Practices Prevention Act*, 1863 (26 & 27 *Vict. c.* 29), *s.* 7.] By s. 7 of the Corrupt Practices Prevention Act, 1863, no person summoned as a witness before any commissioners appointed under the Corrupt Practices Acts shall be excused from answering any question relating to corrupt practices forming the subject of inquiry on the ground that the answer would tend to criminate himself, "provided that no statement made by any person in answer to any question put by or before such commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding civil or criminal:—*Held*, that the exception in the proviso did not apply to an ex officio information by the Attorney-General for perjury. THE QUEEN *v.* SLATOR 267

PARTNERSHIP—Action against—Judgment
See PRACTICE. 14. [474

PENALTY—Continuing offence - - 603
See LOCAL GOVERNMENT ACTS. 4.

PERJURY—Commissioners to inquire into corrupt practices—Indictment—Information - - - - - 267
See PARLIAMENT. 4.

PHARMACY—*The Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *s.* 17—*Poison, sale of—Label—Name and Address of "Seller."*] The Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 17, enacts that it shall be unlawful to sell any poison unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word poison, and with the name and address of the seller of the poison, and any person selling poison otherwise shall upon summary conviction be liable to a penalty, and for the purposes of this section the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller.—The respondent sold at his shop in Friar Street, Oxford, a packet of poison labelled only, "W. Paterson, chemist and druggist, 3, Cowley Road, Oxford"—the name and address of a registered chemist who had supplied the poison to the respondent, and paid him a commission on the sale:—*Held*, that the respondent was the "seller," with whose name and address the packet should have been labelled, and he was liable to a penalty under s. 17, which applies to the person keeping the shop or conducting the business in which the sale is made. TEMPLEMAN *v.* TRAFFORD - 397

PHYSICIAN—Gift—Fiduciary relation - 587
See GIFT.

PLEADING—Facts not stated—Libel—Justification - - - - 491
See DEFAMATION.

—— Non-delivery of reply—Judgment on admissions in pleadings - - - 650
See PRACTICE. 15.

POISON—Sale—Pharmacy Act - - 397
See PHARMACY.

POLL—Right to demand - - - 459
See MEETING OF RATEPAYERS.

POOR LAW—*Order of Removal—Status of Irremoveability—Effect of Break of Residence of Husband on status of Wife*—9 & 10 *Vict. c.* 66, *s.* 1—11 & 12 *Vict. c.* 111, *s.* 1.] A husband who had acquired a status of irremoveability in the P. union went to America in January, 1880, intending to reside there, leaving his wife and children resident in that union; there was no evidence of desertion. In March, 1880, he died in America; in May of the same year the wife and children became chargeable to the union. In April, 1881, an order was made by justices removing the wife and children to Manchester, the husband's last place of settlement:—*Held*, that the break of residence by the husband was, in law, a break in the wife's residence, and that the order of removal was good. THE QUEEN *v.* THE OVERSEERS OF MANCHESTER - - - - - 50

2. —— *Settlement by Residence—Parish—Union*—39 & 40 *Vict. c.* 61, *s.* 34.] A person resided in parish A. for a term of three years which expired before the passing of 39 & 40 Vict. c. 61, in such manner and under such circumstances in each of such years as would render him irremoveable. He then left parish A. and went to reside in parish B. in the same union, from

POOR LAW—*continued.*
which he continued irremovable down to a date subsequent to the passing of the said Act:—*Held*, that he had not acquired a settlement in parish A. under 39 & 40 Vict. c. 61, s. 34. THE GUARDIANS OF SUNDERLAND UNION *v.* THE CLERK OF THE PEACE FOR SUSSEX - - - - 99

POOR-RATE—*Rating of Owners instead of Occupiers under "Sturges Bourne's Act," 59 Geo. 3, c. 12, s. 19—Whether Owners rateable, where Weekly Rent amounting to more than 20l. by the Year.*] By 59 Geo. 3, c. 12, s. 19, the vestry of any parish may resolve that the owners of all houses in the parish, being the immediate lessors of the actual occupiers, which shall be let "at any rent not exceeding twenty pounds by the year for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months," shall be assessed to the rates in respect of such houses, instead of the actual occupiers:—*Held* (by Lord Coleridge, C.J., and Brett, L.J., Baggallay, L.J., dissenting), that this section has no application to houses let at a weekly rent amounting to more than twenty pounds by the year. ILES *v.* THE ASSESSMENT COMMITTEE OF WEST HAM UNION [69

PRACTICE—*Appeal—Costs—Interpleader—Judicature Act, 1873, s. 49—Order I., rule 2—Judge at Chambers—Jurisdiction.*] Order I., rule 2, which preserves the procedure and practice under the Interpleader Acts in actions in the High Court, does not contradict s. 49 of the Judicature Act, 1873, which enacts that no order of a judge of the High Court as to costs only, shall be subject to appeal without leave of such judge; and such enactment applies to a judge's order in interpleader as well as in other proceedings.—A judge at Westminster sitting, not in open Court, but as a judge at chambers, has jurisdiction to hear a summons referred to him by the judge at chambers. HARTMONT *v.* FOSTER - C. A. 82

2. —— *Action remitted to County Court—County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 10—Appeal—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45.*] Where a cause has been remitted for trial before a county court under s. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), it becomes a county court cause, and the determination of a Divisional Court, on appeal from the decision of the county court judge, is within s. 45 of the Judicature Act, 1873, and therefore final, unless special leave to appeal be given. BOWLES *v.* DRAKE - - C. A. 325

3. —— *Charging Order—1 & 2 Vict. c. 110, s. 14—"In trust for him"—Stock vested in Trustees for Judgment Debtor and others—Interest determinable on Alienation—Chargeable Interest.*] An order was made under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, charging a judgment debtor's interest in the dividends on certain bank stock. It appeared that by the terms of a will certain property, including this stock, was bequeathed to trustees on trust as to one moiety thereof for the testatrix's niece, and as to the other moiety in trust to pay the income thereof to her nephew, the judgment debtor, for life, or until he should attempt to alien or charge the same. And, upon his interest determining, there

PRACTICE—*continued.*
were limitations over in favour of his wife for life, and after her death in favour of his children, with an ultimate remainder in the event of the failure of the preceding trusts to the judgment debtor absolutely. At the time when the charging order was made, there was a dividend on the stock accrued due, but which the trustees had not yet received from the bank:—*Held*, that the fact that the stock stood in the name of the trustees in trust for another, besides the judgment debtor, did not prevent its being stock "standing in the name of any person in trust for him," within the words of 1 & 2 Vict. c. 110, s. 14.—*Held*, also, that the accrued dividend and the ultimate remainder to the judgment debtor after failure of the preceding trusts constituted a sufficient chargeable interest, whatever might have been the case with regard to the interest determinable on alienation, if that had stood alone; and that the order was therefore rightly made, the trustees being responsible upon its being made for the due application of the fund according to the legal effect of the order, whatever it might be. THE SOUTH WESTERN LOAN AND DISCOUNT COMPANY *v.* ROBERTSON - - 17

4. —— *Costs—Reference of Action by consent—Costs to abide the Event—County Courts Act, 1867 (30 & 31 Vict, c. 142), s. 5.*] By an order made by consent of the parties, an action on a building contract was referred to an arbitrator to ascertain the amount, if any, due from the defendant to the plaintiff, "the costs of the action, reference, and award, to abide the event." The arbitrator found the sum due to the plaintiff was 19l. 2s. 7d. upon which an order was made for judgment for the plaintiff for that sum, without costs:—*Held*, that the plaintiff had recovered in the action by judgment a sum not exceeding 20l., and that he was therefore deprived of his costs of the action by the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, unless he got a certificate or order for costs under that section.—*Jones* v. *Jones* (7 C. B. (N.S.) 832) overruled. FERGUSSON *v.* DAVISON - - - - - C. A. 470

5. —— *Costs—Trial by a Jury—Nonsuit—Costs of Issues upon which Plaintiff has been Nonsuited—Order LV., r. 1—Procedure where ambiguity in Judgment as to Costs.*] In an action tried by a jury where the plaintiff succeeds upon some issues but is nonsuited upon others, and no order is made as to costs, the defendant is entitled under Order LV., rule 1, to the costs of the issues upon which the plaintiff was nonsuited.—Where there is an ambiguity in the terms of a judgment with respect to costs, and the master in consequence refuses to tax the costs of one of the parties, the proper course is to apply for a direction to the judge who tried the cause, and not to appeal against the master's decision. ABBOTT *v.* ANDREWS - - - - - 648

6. —— *Costs, Taxation of—Plaintiff succeeding upon One Item out of Three of his Claim—Apportionment of Costs under Special Order.*] The plaintiff sued for three items of a claim for work done, and recovered a sum in respect of one of such items only. By an order of the Court it was ordered "that the plaintiff recover against the defendants" that sum, "and such costs as one of the masters may find that he has rightly incurred

in recovering the above amount, and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded, to be also taxed."—On taxation the master allowed the plaintiff the general costs of the cause, disallowing only those which applied exclusively to the parts of his claim on which he failed; and he allowed the defendants such costs only as were incurred by them by reason of the two items of claim which they successfully resisted:—*Held*, reversing the decision of the Queen's Bench Division, that the master had construed the order rightly, and had taxed the costs on the right principle. SPARROW *v.* HILL [C. A. 479

7. —— *Costs—Third Party—Jurisdiction of Court to order to pay Plaintiff's Costs—Appeal as to Costs—Judicature Act*, 1873, *s.* 24, *sub-s.* 3, *and s.* 49—*Order LV.—Contract of sub-Tenant to perform Covenants of head-Lease, whether Contract of Indemnity.*] The High Court has jurisdiction to order a third party to pay to an unsuccessful defendant the costs payable by such defendant to the plaintiff.—Per Brett and Cotton, L.JJ.: The contract of a sub-tenant to perform the covenants of the head-lease is a contract of indemnity.—The plaintiff let to the defendant a house, for twenty-one years with option to determine the lease at the end of seven or fourteen, by deed containing covenants by the defendant to repair and paint and leave in repair. The defendant, after having occupied for five years, sublet the house to H. for the remainder of the first seven years by a writing with a clause, that "the letting should be subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein." At the end of the seven years, the defendant having determined the lease in the exercise of his option, the plaintiff claimed from the defendant, and the defendant claimed from H., the amount at which dilapidations had been assessed by the plaintiff's surveyor. H. declined to pay or to give the defendant an indemnity, or to take any responsibility in the matter. The plaintiff sued the defendant, who brought in H. as third party. The issues, as between the plaintiff and the defendant, and the defendant and H., were referred separately to an official referee, who reported that the sum claimed by the plaintiff was due from the defendant to the plaintiff, and that a similar sum was due from H. to the defendant.—A Divisional Court (Lord Coleridge, C.J., and Field, J.), on adopting the second report, ordered H. to pay all costs as between the plaintiff and the defendant:—*Held*, by the Court of Appeal (Jessel, M.R., Brett and Cotton, L.JJ.), that these were costs within the discretion of the High Court, and therefore that this order was not appealable; and by Brett and Cotton, L.JJ., that H.'s contract was a contract of indemnity, under which the defendant was entitled to recover from H. all the costs of an action by the plaintiff against the defendant reasonably defended. HORNBY *v.* CARDWELL - - - - C. A. 329

8. —— *Discovery and Inspection of Documents—Shorthand Notes of Proceedings in previous Action—Privilege.*] An action having been commenced to determine whether the defendant had or had not executed a certain agreement, the defendant, while the action was pending, commenced an action against other persons, whom he charged with a conspiracy to defraud him, and to utter the agreement as binding upon him, knowing it to be a forgery. After the commencement of the second action, the defendant caused shorthand notes to be taken of the evidence, speeches, and summing-up at the trial of the first action, as he deposed, for the purpose ["amongst others"] of his case in the second action:—*Held*, upon the above facts, that the shorthand notes were privileged from inspection in the second action, and that the affidavit need not shew that the notes came into existence exclusively for the purposes of such action. NORDON *v.* DEFRIES - - 508

9. —— *Interrogatories—Written Document—Whether Party interrogated can be compelled to state his recollection of Contents of written Documents not in his Possession.*] In an action for libel, one of the plaintiff's interrogatories required the defendant to state whether she had not written and sent letters to a third person making certain defamatory statements of the plaintiff set out in the interrogatory, or statements to the same purport and effect, and to set out as fully as she could what her statements were. The defendant answered that to the best of her recollection and belief she never wrote any letter making the statements set out in the interrogatory, "or any of those exact statements set out in the interrogatory, "or any of those exact statements;" that she did write a letter to the third person, but that she had no copy of it, and was unable to recollect "with exactness" what the statements contained in it were:—*Held*, that the answer was sufficient. DALRYMPLE *v.* LESLIE - - - - 5

10. —— *Judgment Creditor—Attaching Debt under Garnishee Order—Trust Money—Rules of Court*, 1875, *Order XLV., rr.* 6, 7.] A garnishee order nisi, obtained by a judgment creditor to attach money owing to the judgment debtor, ought not to be made absolute if it be suggested, and there is reasonable ground for so suggesting, that the money sought to be attached is trust money, and not really the money of the judgment debtor, even though such suggestion be not made by the garnishee, and the case, therefore, not within Order XLV., rules 6 and 7. If the fact suggested be disputed, the proper order to make would be that the money should be paid into court to abide the event of any inquiry, whether it be trust money or not. ROBERTS *v.* DEATH - - C. A. 319

11. —— *Married Woman, Judgment against—Order XIV., r.* 1—*Form of Order.*] An order having been obtained under Order XIV., rule 1, for leave to sign final judgment against a married woman in an action for the price of goods supplied to her during coverture:—*Held*, that the order was wrongly made, inasmuch as there can be no judgment against a married woman personally in respect of such a claim. DURRANT *v.* RICKETTS AND WIFE - - - - 177

12. —— *New Trial—Verdict against Evidence—Principle on which New Trial allowed.*] The question whether a new trial should be granted on the ground that the verdict was against the

PRACTICE—*continued.*

weight of evidence, must depend upon whether the verdict was such as reasonable men ought to have given, and not upon whether the learned judge who tried the action was dissatisfied or not with the verdict. Solomon *v.* Bitton **C. A. 176**

13. —— *Official Referee—Compulsory Reference—Judicature Act*, 1873, *ss.* 56 *and* 57—*Appeal from Judicial Discretion in directing Trial before an Official Referee.*] The Court of Appeal has power to review the order made by a judge under s. 57 of the Judicature Act, 1873, who, having jurisdiction to make such order, has in the exercise of his discretion ordered the issues of fact in an action to be tried by an official referee, on the ground that they required prolonged examination of documents and also scientific and local investigation; but the Court of Appeal, whose discretion in such case is to be substituted for that of the judge, will not exercise such discretion except in a strong case where it clearly thinks the judge has wrongly exercised his discretion, and that an injustice has been done by the order he has so made.—So *held* by Brett and Holker, L.JJ. (Lord Coleridge, C.J., doubting if the Court had jurisdiction to review the discretion of the judge).—*Semble*, per Brett, L.J., that the "prolonged examination of documents," intended by s. 57 of the Judicature Act, 1873, is an examination required to enable the judge to leave questions of fact to the jury; and not an examination to enable him to determine a question of legal right. Ormerod *v.* Todmorden Mill Company - **C. A. 664**

14. —— *Action against Partnership Firm—Judgment—Order IX., r.* 6, *and Order XLII., r.* 8.] Where the writ in an action is issued against a partnership firm in the name of the firm the judgment must be against the firm, and it cannot be separately entered against an individual member of the firm who has made default in appearing to the action. Jackson *v.* Litchfied - - **474**

15. —— *Pleading—Reply, effect of non-delivery of—Judgment on Admissions in Pleadings—Counter-claim—Order XXIX., r.* 12; *Order XL., r.* 11.] The plaintiff having made default in delivery of reply to defendant's statement of defence and counter-claim:—The Court ordered final judgment to be entered for the defendant in respect of both the claim and counter-claim under Order XL., rule 11. Lumsden *v.* Winter **650**

16. —— *Pleading—Reply—Counter-claim and Set-off in Reply—Judicature Act*, 1873, *s.* 24, *sub-ss.* 3, 7—*Order XIX., rr.* 3, 19; *Order XX., r.* 1.] A plaintiff may, in his reply to a counter-claim of the defendant, counter-claim in respect of a cause of action accrued after the issue of the writ, but arising at the same time and out of the same transaction as the counter-claim of the defendant. Toke *v.* Andrews - - **428**

17. —— *Quarter Sessions—Case stated—*12 *&* 13 *Vict. c.* 45, *s.* 11—*Agreement for entry of Judgment according to the opinion of the Court.*] A case stated for the opinion of the Queen's Bench Division, under s. 11 of 12 & 13 Vict. c. 45, should contain a statement of the agreement of the parties that judgment in conformity with the decision of the Court may be entered at Quarter Sessions in the manner provided by the section.

PRACTICE—*continued.*

The Corporation of Peterborough *v.* The Overseers of Thurlby - - - **586**

18. —— *Third Party—Directions as to mode of having Questions in Action Determined—Refusal of Court to order one Trial—Dismissal of Third Party from Action—Rules of Supreme Court*, 1875, *Order XVI., rr.* 18, 21.] The plaintiff having sued for breach of contract in respect of goods, the defendants, under the Rules of the Supreme Court, 1875, Order XVI., rule 18, brought in as a third party P. from whom they themselves had bought the goods. The defendants afterwards, under Order XVI., rule 21, applied for directions as to the mode of having the questions in the action determined; but the Court refused to give any directions. The defendants delivered a claim to the third party, who in turn delivered to them a defence. The action having been tried between the plaintiff and the defendants, the latter delivered a reply to the third party, and gave notice of trial:—*Held*, that the reply and notice of trial must be set aside, for it must be taken that the action came to an end as regarded the third party, when the Court refused to give directions. Schneider *v.* Batt **[C. A. 701**

19. —— *Time—County Court—Action to recover Lands—Delivery of Summons to Bailiff—County Court Rules*, 1875, *Order VIII., r.* 7—*Jurisdiction—Appeal—Prohibition.*] By Order VIII., rule 7, of the County Court Rules, 1875, "the summons in an action brought to recover lands shall be delivered to the plaintiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof." The plaintiff in an action in the county court to recover lands delivered the summons to the bailiff thirty-nine clear days and the bailiff served it upon the defendant thirty-eight clear days, before the return day. At the hearing the county court judge ruled that the service was good, and tried the case, giving judgment for the plaintiff:—*Held*, that the provision in rule 7 with respect to the time of delivering the summons to the bailiff was obligatory, and not merely directory, and therefore that the judge ought not to have tried the case.—*Held*, also, that the defendant's proper remedy was to appeal from the judge's ruling, and not to apply for a prohibition against the issue of execution on the judgment. Barker *v.* Palmer - - **9**

20. —— *Time from which Writ takes effect—Day, Fractions of—Writ of Summons issued on the same day as Cause of Action accrued—Fiction of Law—Distinction between original and judicial Writ—Effect of Statute Law Revision Act*, 1875, *on Parliamentary Oaths Act*, 1866 (29 *Vict. c.* 19), *and Promissory Oaths Act*, 1868 (31 *&* 32 *Vict. c.* 72).] To issue a writ of summons is not a judicial act, and the Court may inquire at what period of the day it was issued.—It appeared from the statement of claim that the writ of summons in the action was issued on the 2nd of July, and that the cause of action arose on the same day, but before the issue of the writ. The statement of claim was demurred to on the ground that the issuing of the writ was a judicial act, and must, therefore, be presumed to have taken place at the

PRACTICE—*continued.*
earliest moment of the day, before the cause of action accrued:—*Held*, affirming the judgment of the Queen's Bench Division, that the Court could inquire whether or not the writ was in fact issued after the cause of action accrued.—The penal clauses of the Parliamentary Oaths Act, 1866, are not repealed by the Statute Law Revision Act, 1875. CLARKE *v.* BRADLAUGH - - C. A. 63

PRIZE-FIGHT—Aiding and abetting - 534
See CRIMINAL LAW. 7.

RAILWAY — *Costs — Railway Commissioners—Successful Defendant ordered to pay unsuccessful Applicant's Costs—Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 28.] The Railway Commissioners have jurisdiction under the Regulation of Railways Act, 1873, s. 28, to order a railway company, in whose favour they have decided upon an application to them against such company, to pay costs to the unsuccessful applicant. [Reversed in Court of Appeal, vide p. 515, and next case, inf.]. FOSTER *v.* GREAT WESTERN RAILWAY COMPANY - - - - 25

2. —— *Costs—Railway Commissioners—Successful Defendant ordered to pay unsuccessful Applicant's Costs—Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 28—*Supreme Court of Judicature Act*, 1875, *Order LV.*] The Railway Commissioners have no jurisdiction under the Regulation of Railways Act, 1873, s. 28, to order a railway company, in whose favour they have decided upon an application to them against such company, to pay costs to the unsuccessful applicant.—Judgment of the Queen's Bench Division (ante, p. 25) reversed. FOSTER *v.* GREAT WESTERN RAILWAY COMPANY - - C. A. 515

3. —— *Reduced Rate—Conditions—"Detention"—Wrongful Refusal to deliver at end of Transit — Mistake as to whether Carriage was paid.*] The plaintiff delivered cattle, carriage prepaid, to the defendant railway company for carriage on the terms of signed conditions whereby, in consideration of an alternative reduced rate, it was agreed that the company were "not to be liable in respect of any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except upon proof that such loss, detention, or injury, arose from the wilful misconduct of the company or its servants."—The cattle were carried; but, on application made for them by the plaintiff, the defendants, in consequence of their clerk having negligently omitted to enter the cattle on the consignment note as "carriage paid," refused to deliver them, and alleged that the carriage was not paid. The cattle were kept exposed to the weather until the next day, when the mistake having then been ascertained, they were delivered. They were damaged by the exposure. In an action for damages by reason of wrongful detention and negligence:—*Held*, that the withholding of the cattle, under a groundless claim to retain them, at the end of the transit was not "detention" within the conditions, and the company were therefore liable. GORDON *v.* GREAT WESTERN RAILWAY COMPANY - 44

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—— Penalty for travelling with intent to avoid payment of fare—Justices—Procedure
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RATE—Abandonment—Fresh rate - 339
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—— Owner rated instead of occupier—Tenements whether occupied or unoccupied 306, 486
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REASONABLE AND PROBABLE CAUSE—Evidence - - - - 167
See MALICIOUS PROSECUTION.

RENT-CHARGE—Assignee of land—Liability to covenant - - - - 403
See COVENANT.

REVENUE — *Inhabited House Duty—Dwelling-house let in different Tenements*—41 *Vict. c.* 15, *s.* 13.] By 41 Vict. c. 15, s. 13, where any house being one property is divided into and let in different tenements, and any of such tenements are occupied solely for the purpose of any trade or business or of any profession or calling, by which the occupier seeks a livelihood or profit, or are unoccupied, inhabited house duty is to be assessed as if the house comprised only the tenements other than those so occupied as aforesaid, or unoccupied; and a house or tenement occupied solely as aforesaid is exempt, although a servant or other person may dwell in such house or tenement for the protection thereof.—A house had one entrance into the street, and the rooms in it opened on a hall, passages, and staircase, common to all the tenants. Some of the rooms on the ground floor were occupied by the landlords, the appellants, as offices, and the remainder, and the rooms on the first floor, were let to tenants who occupied them as offices. The rooms on the second floor were occupied partly by tenants who resided, and the remainder by a care-taker and his wife, who acted as servants to the residents and cleaned the several portions occupied by the appellants as offices or let off. The appellants claimed relief from being assessed on the portions used as offices:—*Held*, affirming the decision of the Queen's Bench Division, that the portions so used were not exempt, as the exemption applies to houses let in separate and distinct tenements each complete in itself, and not to rooms in a house. YORKSHIRE FIRE AND LIFE INSURANCE COMPANY *v.* CLAYTON - - - C. A. 421

2. —— *Income Tax—Foreign Telegraph Company—Marine Cables—Exercising Trade in England—Messages forwarded from England to remote parts of the World*—16 & 17 *Vict. c.* 34; 5 & 6 *Vict. c.* 35.] The appellants, a foreign company domiciled in Copenhagen, had three marine cables in connection with Aberdeen and Newcastle, communicating with the telegraph lines of the Post Office in the United Kingdom. They had also work-rooms with clerks in London, Newcastle, and Aberdeen. Messages from this country were forwarded over the lines of the Post Office and the cables of the appellants to Denmark, and thence by their wires and the wires of foreign governments to Russia, China, Japan, and India. The total charges paid for transmitting such messages were collected by the Post Office, and, after deducting their dues, handed to the

REVENUE—*continued.*
appellants, who retained the amount due to them for the transmission of messages over their cables and lines, and paid the residue to the various Governments and companies respectively entitled to it. No profits were made by the appellants from the transmission of messages over the land lines in the United Kingdom:—*Held*, affirming the decision of the Queen's Bench Division, that the appellants must be taken to exercise a trade in the United Kingdom under 16 & 17 Vict. c. 34, s. 2, Sched. D, and that they were chargeable to income tax on the balance of profits or gains from their receipts in this country from the transmission of messages. ERICHSEN *v.* LAST C. A. 414

3. —— *Succession Duty—Settlement—Reservation of Interest to Settlor—Alternative Conditions of Succession—Succession at a Fixed Time or on Death of Settlor — Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 5, 10, 32.] A settlor, by deed containing no power of revocation, settled personal property upon trust for himself for a term of four years, if he should so long live, and at the end of the term, or at his death, whichever should first happen, upon trust for other persons. Before the end of the term the settlor died, and the persons entitled in remainder came into possession of the settled property:—*Held*, by the Court of Appeal (Jessel, M.R., Brett and Cotton, L.JJ.), that as the succession actually took effect on the death of the settlor, succession duty was payable on the whole of the fund, and not merely on the income of it for the period between the death of the settlor and the end of the term. ATTORNEY-GENERAL *v.* NOYES - C. A. 125

RULES—Order XIV., r. 1 - - - 177
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—— Order XVI., rr. 18, 21 - - - 701
See PRACTICE.

—— Order XIX., r. 4 - - - 491
See DEFAMATION.

—— Order XIX., rr. 3, 19 - - - 428
See PRACTICE. 16.

—— Order XX., r. 1 - - - 428
See PRACTICE. 16.

—— Order XXIX., r. 12 - - - 650
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—— Order XXXI., r. 11 - - - 142
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—— Order XL., r. 11 - - - 650
See PRACTICE. 15.

—— Order XLII., r. 8 - - - 474
See PRACTICE. 14.

—— Order XLV., rr. 6, 7 - - - 319
See PRACTICE. 10.

—— Order LV. r. 1 - - - - 648
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—— Order LV. - - - - 329
See PRACTICE. 7.

SALE OF GOODS—*Felony—Sale of stolen Beasts in Market overt—Conviction of Thief—Restitution—Claim by Purchaser against Owner for Costs of keeping the Beasts.*] The bonâ fide purchaser of stolen beasts sold in market overt, cannot, in answer to a claim for them by the original owner after the conviction of the thief, counter-claim for

SALE OF GOODS—*continued.*
the cost of their keep while the beasts were in the possession of the purchaser, for they were his own property until, on the conviction, the property revested in the original owner. WALKER *v.* MATTHEWS - - - - - 109

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SEWER—Obligation to support—Local Government Acts - - - - 86
See LOCAL GOVERNMENT ACTS. 7.

SHIP—*General Average—Ship on Fire in Harbour — Water poured upon Cargo — Termination of Maritime Adventure—Arrival of Ship at Port of Destination—Cargo remaining on Board.*] To pour water upon the cargo pursuant to the master's orders for the purpose of extinguishing a fire which has broken out in a ship's hold, is a general average act, and if the cargo is thereby injured, the owner is entitled to a contribution.—Whilst the cargo remains on board a ship after her arrival at the port of destination, the maritime adventure is not terminated so as to absolve the owners of the cargo and the ship from mutual rights and liabilities.—The defendants were the owners of the H., which having arrived at her port of destination at the end of a voyage, unloaded about 1300 tons of her cargo; about 100 tons remained on board. Whilst she was lying at a wharf, a fire broke out in her hold, and in order to extinguish it her master caused water to be poured into her, whereby some goods, forming part of the cargo and belonging to the plaintiffs, were damaged. The H. might have been scuttled and raised again; but if the fire had not been extinguished, she would have been in peril of partial destruction:—*Held*, that the defendants were liable to contribute by way of general average for the damage done to the plaintiffs' goods. THE WHITECROSS WIRE AND IRON COMPANY *v.* SAVILL - - - C. A. 653

2. —— *Charterparty—Commencement of Lay Days—"Frost preventing Loading."*] By the terms of the charterparty the ship was to proceed to the port of loading and there load a cargo of iron in the customary manner from the agents of the freighters. Cargo to be supplied as fast as steamer can receive. Time to commence from the vessel being ready to load, and ten days on demurrage over and above the said lay days at 40*l.* per day. (Except in case of hands striking work, or frost or floods, or any other unavoidable accidents preventing the loading; in which case owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.") On the ship's arrival the loading was commenced, but shortly afterwards was wholly

SHIP—*continued.*
stopped for five days through frost:—*Held*, by Pollock, B., that the exception in the charter-party did not apply only to cases in which the commencement of the loading was prevented through any of the specified causes, but that it applied also where delay in supplying cargo occurred after the loading had commenced, and therefore that the freighters were not liable to demurrage. COVERDALE *v.* GRANT - 600

3. —— *Charterparty, Construction of — Customary manner of Loading—Detention by Frost—Demurrage.*] By the terms of a charterparty the ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of rail iron; the cargo to be loaded as fast as steamer could take on board and stow within the customary working hours of the port, commencing when steamer was in berth and ready to load; and if longer detained merchants to pay steamer 30*l.* per day demurrage. "Detention by frost, floods, &c., not to be reckoned as lay days."—The shipowner, when the charter-party was made, did not know who were the freighters' agents at Cardiff. There were about six shippers of rail iron there, all of them (with the exception of the freighters' agents) having wharves in the West or East Bute Dock. The agents' wharf was at a distance from the docks upon a canal communicating with the West Bute Dock, and their rail iron was loaded on ships berthed in the East Bute Dock by means of lighters passing down this canal through the West Bute Dock, and from thence down a smaller canal connecting the two docks. The other ship-pers loaded in the East Bute Dock, either from the quay or by lighters coming alongside the ship from the wharves in the East Bute Dock, or by lighters from the West Bute Dock, passing down the connecting canal.—The ship, on arrival, was berthed in the East Bute Dock, and the loading was commenced, but shortly afterwards was stopped for sixteen days by frost, which covered the canal from the agents' wharf to the West Bute Dock with ice and prevented the passage of the lighters, though the water in the docks was not frozen:—*Held*, by Pollock, B., that, as the conveyance of the iron in lighters from the agents' wharf through the canals was part of the act of loading, and one of the customary modes of loading in the port, the exception in the charterparty with respect to detention by frost applied to relieve the freighters from liability to demurrage. KAY *v.* FIELD - - 594

—— Discovery of ship's papers - - 142
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SOLICITOR—*Attachment against unqualified Person for acting as a Solicitor in the Name of a qualified Solicitor—6 & 7 Vict. c. 73, s. 2; 23 & 24 Vict. c. 127, s. 26.*] An unqualified person who acts as a solicitor commits an offence against 6 & 7 Vict. c. 73, s. 2, though he acts in the name and with the consent of a duly qualified solicitor. —H., who had carried on the business of an accountant, arranged with C., who had been admitted as a solicitor, that he should use H.'s offices, and any business H. had he was to allow C. to attend to, H. to share in the profits, but in

SOLICITOR—*continued.*
what proportion was not settled,—or, according to H.'s version of the arrangement, H. was to be paid, as a commission, one half share of profits after deducting all expenses, including rent of offices, and was to find money and clerk to carry on the business. Pursuant to this arrangement, H., sometimes with C. and sometimes alone, trans-acted various matters which it was alone com-petent to a solicitor to transact, generally using the name of C. & Co., but sometimes not, and not always with the knowledge or express sanction of C.:—*Held*, by the Court of Appeal, affirming the Queen's Bench Division, that H. had been guilty of a contempt of Court, and that an attachment must issue against him. ABERCROMBIE *v.* JORDAN [187

2. —— *Certificate — Stamp — Attendance of Country Solicitor at a Taxation in London — "Practising"—33 & 34 Vict. c. 97, s. 59—Schedule.*] By 33 & 34 Vict. c. 97, s. 59, every person who "acts or practises" in any Court as a soli-citor without having in force at the time a duly stamped certificate shall forfeit 50*l.*, and shall be incapable of maintaining any action or suit for the recovery of any fee on account of any act or proceeding done or taken by him in any such capacity. By the schedule the certificate if such person "practises or carries on his business" within ten miles from the General Post Office of the City of London is of a certain amount, and if he practises or carries on his business beyond the above-mentioned limits, is of a less amount. A solicitor, with a country certificate, and whose offices were at Birmingham, came up on a retainer and attended the taxation of a bill of costs within the ten mile radius:—*Held*, that he did not, by this one transaction, act or practise in London within the meaning of the statute. *In re* HORTON [434

3. —— *Liability of Town Agent of Country Solicitor to pay to Client amount of Debt received in an Action—Summary Jurisdiction of the Court.*] The town agent of the solicitor of the plaintiff, in an action in which judgment had been recovered for a debt, refused to pay over to the plaintiff the amount of the debt which had been received by him from the sheriff under a writ of fi. fa., on the ground that he was entitled to retain such amount for a debt due to him from the country solicitor of equal amount.—The country solicitor had no lien on such amount against his client, the plain-tiff:—*Held*, affirming the decision of the Queen's Bench Division, that the Court in the exercise of its summary jurisdiction over its own officers would order the town agent to pay over the amount of the debt to the plaintiff.—In such a case the Court will exercise its summary jurisdic-tion, although there be no fraud imputed to the town agent. *Ex parte* EDWARDS - C. A. 262

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3 & 4 Vict. c. 61, s. 1 - - - 369
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3 & 4 Vict. c. 65, s. 6 - - - 609
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5 & 6 Vict. c. 35 - - - - 414
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6 & 7 Vict. c. 73, s. 2 - - - 187
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6 & 7 Vict. c. 86, ss. 10, 21, 24, 28, 35 - 104
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8 Vict. c. 20, ss. 103, 145 - - - 151
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10 Vict. c. 17, ss. 43, 74 - - - 632
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16 & 17 Vict. c. 51, ss. 2, 5, 10, 32 - 125
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16 & 17 Vict. c. 119, s. 3 - - - 275
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24 Vict. c. 10, s. 7 - - - - 609
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24 & 25 Vict. c. 96, ss. 75, 76 - - 706
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24 & 25 Vict. c. 97, s. 52 - - - 283
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25 & 26 Vict. c. 89 - - - - 179
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25 & 26 Vict. c. 102, s. 98 - - - 445
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26 & 27 Vict. c. 29, s. 7 - - - 267
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26 & 27 Vict. c. 93, ss. 14, 16 - - 632
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29 & 30 Vict. c. 114, ss. 5, 7 - - 459
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30 & 31 Vict. c. 102, s. 4 - - - 247
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30 & 31 Vict. c. 102, s. 61 - - - 195
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30 & 31 Vict. c. 106, s. 27 - - - 158
See ELEMENTARY EDUCATION.

30 & 31 Vict. c. 142, s. 5 - - - 470
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—— —— s. 10 - - - - 411
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31 & 32 Vict. c. 121, s. 17 - - - 397
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31 & 32 Vict. c. 122, s. 37 - - - 571
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32 & 33 Vict. c. 27, s. 8 - - - 369
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32 & 33 Vict. c. 62, s. 13 - - - 530
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32 & 33 Vict. c. 71, s. 39 - - - 147
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33 & 34 Vict. c. 97, s. 59 - - - 434
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35 & 36 Vict. c. 60, s. 22 - - - 339
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35 & 36 Vict. c. 94, s. 3 - - - 373
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36 & 37 Vict. c. 48, s. 28 - - - 515
See RAILWAY.

36 & 37 Vict. c. 66, s. 45 - - - 325
See PRACTICE. 2.

37 & 38 Vict. c. 50, s. 5 - - - 380
See HUSBAND AND WIFE.

38 & 39 Vict. c. 40, s. 1, sub-s. 2 - - 450
See MUNICIPAL ELECTION. 2.

38 & 39 Vict. c. 55, ss. 15, 16, 175, 308 - 86
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41 & 42 Vict. c. 31, s. 10 - - - 111
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42 & 43 Vict. c. 49, s. 21, sub-s. 3 - 511
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43 & 44 Vict. c. 42, ss. 4, 7 - - 482
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VENDOR AND PURCHASER—*Conditions of Sale—Land over Railway Arch, &c.—Ultra vires Sale by Railway Company to Vendor—Sale of Possessory Title only—Forfeiture of Deposit on refusal to complete.*] The defendant purchased from a railway company land over a tunnel, which, not being "superfluous," the company had no power to sell, and the plaintiff contracted to purchase the land from the defendant as freehold building land. One of the conditions of sale was that the title should commence with the conveyance from the company; another, that the purchaser should not require the production of, or investigate or make any objection or requisition in respect of, such conveyance; and another, that the purchaser should send his objection, if any, to the title within seven days from the delivery of the abstract. The plaintiff declined to complete after the expiration of the seven days, and sued for the deposit:—*Held*, by the Court of Appeal (Jessel, M.R., and Brett and Cotton, L.JJ.), reversing the decision of Lindley, J., that the deposit could not be recovered. ROSENBERG *v.* COOK - - - - - C. A. 162

—— Insurance by vendor—Right to insurance money - - - - 613
See INSURANCE (FIRE).

WATERWORKS COMPANY—*Supply of Water by Measurement — Meter, Obligation to provide — Cutting off Supply—Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *ss.* 14, 16—*Waterworks Clauses Act*, 1847 (10 *Vict. c.* 17), *ss.* 43, 74—*Failure to pay or tender Rate in Advance.*] The special Act of a water company provided for the supply of water to the inhabitants of the district for "family use" at certain rates calculated on the rental of the house supplied. The Act contained further provisions for the supply of water for schools, manufactories, &c., &c., and for other purposes than family consumption, and for baths, &c., and for the purposes of any trade or business whatsoever at certain rates per thousand gallons. The supply of water under these latter provisions having been held obligatory upon the company unless prevented by causes beyond their control:—*Held*, that, there being no provision in the special Act throwing upon the consumer the obligation of providing a meter to measure the water supplied for the purposes of a bath, no such obligation could be implied from the 14th section of the Waterworks Clauses Act, 1863, incorporated with the special Act, which section provides that where the undertakers are authorized by the special Act to supply water by measure they may let for hire to any consumer of water so supplied any meter or instrument for measuring the quantity of water supplied. The occupier of a house within the district of the above-mentioned company had a bath connected by means of a pipe with the house cistern, to which water was conveyed from the company's mains for "family use." The company required him to put up a meter for the purpose of measuring the water used for the bath, but he refused to do so. He had paid to the company in advance the proper amount in respect of the water supply for "family use" for the quarter ending the 29th of September, but had not paid or tendered any sum in respect of the water supply to the bath during such period. The company in consequence of his refusal to put up a meter or disconnect the bath, cut off the communication pipe from their main to his house upon the 20th of September. On the 29th of September, having cut off the pipe connecting the cistern with the bath, but not the waste or outlet pipe from the bath, he gave notice to the company of what he had done and paid to the company in advance the proper amount for the supply of water for "family use" during the ensuing quarter but did not restore the communication pipe between the company's mains and his cistern. The company refused to restore the supply on the ground that he had not cut off the waste-pipe from the bath, which he refused to do. The supply of water was not renewed till the 4th of November, when the company restored the communication pipe under protest:—*Held*, that the company were not entitled to insist on the consumer's providing a meter, but that they were not liable to a penalty under the Waterworks Clauses Act, 1847, s. 43, for not supplyng water during the period between the 20th and the 29th of September, inasmuch as no payment or tender in respect of the water supply to the bath for such period had been made. But *held* that the company were liable to a penalty in respect of the period subsequent to the 29th of September: that they had no right to refuse the supply of water after that date, and that they were not justified in cutting off the supply, and were, therefore, not entitled to require the consumer to renew the communication. THE SHEFFIELD WATERWORKS CO. *v.* CARTER. BROOKS *v.* THE SAME - - 632

WILL—"*Issue and their Heirs*"—*Gift over on Death without leaving Children—Estate Tail—Remainder in Fee.*] The owner of land devised it to his eldest son L. "for life, and after his decease to his lawful issue and their heirs for ever, if any," and "if he should die without leaving any children born in wedlock, then to the testator's son E. and his heirs:—*Held*, that the devise gave a life estate only to L. and not an estate tail. MORGAN *v.* THOMAS - - 575

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